[illegible] OF RECORD

[illegible] OF THE UNITED STATES

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[illegible] OF THE UNITED STATES FOR THE [illegible] PLAINTIFF IN ERROR

[illegible] AND ADDRESS OF COUNSEL [illegible] THE TIME OF FILING OPINIONS

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SUPREME COURT OF THE UNITED STATES

October Term, 1925

No. 393

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR

vs.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

INDEX

1 **In United States District Court, District of Massachusetts**

Writ of error and return

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Harold J. Coolidge, of Boston, and Augustus P. Loring, of Beverly, in the Commonwealth and District of Massachusetts, executors of the will of Julia Coolidge, late of Brookline, in said Commonwealth and district, plaintiffs, and Malcolm E. Nichols, of Boston, in the Commonwealth and district of Massachusetts, collector of internal revenue of the United States, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the fourth day of May next, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the third day of April, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.]

JAMES S. ALLEN,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
ELISHA H. BREWSTER,
U. S. District Judge.

2 *Return of District Court on writ of error*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the District Court of the United States, in and for the district of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceed-

ings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof I, James S. Allen, clerk of said District Court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-fourth day of April, A. D. 1925.

[SEAL.] JAMES S. ALLEN, *Clerk.*

3 In United States District Court

No. 2236, Law Docket

HAROLD J. COOLIDGE ET AL., PLAINTIFFS

v.

MALCOLM E. NICHOLS, COLLECTOR, DEFENDANT

Writ of attachment and marshal's return

Filed Feb. 7, 1924

MASSACHUSETTS DISTRICT, *ss:*

(L. S.) *The President of the United States of America,*

To the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Malcolm E. Nichols, of Boston, in the Commonwealth and district of Massachusetts, collector of internal revenue of the United States for the district of Massachusetts, defendant, to the value of fifty thousand dollars, and to summon the said defendant (if he may be found in your district) to appear before our judges of our District Court, next to be holden at Boston, within and for our said district of Massachusetts, on the third Tuesday of March, next. Then and there, in our said court, to answer unto Harold J. Coolidge, of said Boston, and Augustus P. Loring, of Beverly, in said Commonwealth and district of Massachusetts, executors of the will of Julia Coolidge, late of Brookline, in said Commonwealth and district, plaintiffs. In an action of contract; to the damage of the said plaintiffs (as they say) the sum of fifty thousand dollars, which shall then and there be made to appear, with other due damages. And have you
4 there this writ, with your doings therein.

Witness, the honorable James M. Morton, jr., at Boston, the tenth day of January, in the year of our Lord one thousand nine hundred and twenty-four.

JOHN E. GILMAN, JR.,
Deputy Clerk.

Officer's return on writ

BOSTON, *January 12, 1924.*

UNITED STATES OF AMERICA,
Massachusetts District, ss.:

Pursuant hereunto I have this day attached a chip as the property of the within named Malcolm E. Nichols and thereafter on the same day I summoned the within named defendant to appear at court and answer as within commanded by giving to him in hand at Boston, in said district an original summons to the within writ.

WILLIAM J. KEVILLE,
U. S. Marshal.
By JOHN J. HARVEY, *Deputy.*

Service	$2.00
Travel	.12
	$2.12

In United States District Court

Statement re declaration

As filed February 7, 1924

(Memorandum: By agreement of parties, copy of declaration is here omitted as a substituted declaration was later filed and will be found hereafter corded. James S. Allen, clerk.)

In United States District Court

Minute entries

Upon the filing of the writ and declaration herein, an order to plead was entered.

On the seventh day of March, A. D. 1924, the following answer was filed:

In United States District Court

Answer

Filed March 7, 1924

Now comes the defendant in the above entitled action and for answer denies each and every material allegation, item, count and particular in the plaintiffs' writ and declaration contained.

ROBERT O. HARRIS,
United States Attorney.
By ALBERT F. WELSH,
Assistant U. S. Attorney.

5 This cause was thence continued to the March term, A. D. 1924, when, to wit, April 12, 1924, the following motion to amend declaration and substituted declaration was filed and assented to:

In United States District Court

Motion to amend declaration and substituted declaration

Filed April 12, 1924

The plaintiffs move that the declaration be amended by substituting therefor the following:

Substitute declaration

Count 1. Julia Coolidge (the plaintiffs' testatrix) and J. Randolph Coolidge gave certain property to trustees who, by a deed dated July 29, 1907, undertook to hold said property in trust to pay the net income to them or the survivor of them for life and on the death of the survivor to distribute the remainder equally among their five named sons, the next of kin of any deceased son to take such sons's share. By a deed dated April 6, 1917, said Julia Coolidge and J. Randolph Coolidge assigned to their said five sons all right to receive the net income of said trust fund and all their interest in said fund and directed said trustees to pay over such net income to said sons accordingly. Acting on said assignment said trustees have ever since paid the net income to said sons, all of whom are still living. On January 6, 1921, Julia Coolidge died leaving a will which was duly allowed by the probate court for Norfolk County in the Commonwealth of Massachusetts. On February 2, 1921, letters testamentary were issued to the plaintiffs, who were named in said will as the executors thereof, and the plaintiffs now, as at all times since, are such executors. The plaintiffs as such executors made due return of the value of the estate, etc., as required by section 404 of the revenue act of 1918. The Commissioner of Internal Revenue, assuming to treat the trust fund above mentioned as a part of the gross estate of the testatrix within the meaning of said revenue act, assessed with respect to said trust fund a tax in the sum of $25,641.91 and demanded payment of the same. On June 8, 1923, the plaintiffs paid to the defendant (in his capacity of collector of internal revenue of the United States for the district of Massachusetts) under written protest said sum of $25,641.91 together with $1,580.65
6 by way of interest thereon (making a total of $27,222.56), and thereafter seasonably filed with said commissioner a claim for the refunding of the amount so paid. On November 7, 1923, said commissioner rendered a decision disallowing said claim in its entirety upon the ground that said Julia Coolidge must be deemed to have made a transfer of the property in question intended to take effect in possession and enjoyment at her death. Said tax was

erroneously and illegally assessed and payment of said amount of $27,222.56 was erroneously and illegally exacted and said claim for refund was improperly disallowed, (1) because said Julia Coolidge did not within the meaning of section 402 of said revenue act at any time make any transfer of the property in question or at any time create any trust with respect to the same in contemplation of or intended to take effect in possession or enjoyment at or after her death, and (2) because all interests created by said trust deed had become irrevocable and absolutely vested prior to the enactment of said revenue act, so that, if said section 402 is construed as purporting to impose a tax with respect to the transfer of any interests created by said trust deed, it is repugnant to the Constitution of the United States and especially to subdivision 4 of section 9 of Article I thereof and to the fifth amendment thereto. The defendant therefore owes the plaintiffs said sum of $27,222.56, with interest thereon from June 8, 1923.

Count 2. Julia Coolidge (the plaintiffs' testatrix) by deeds dated May 18, 1917, conveyed two parcels of real estate situated respectively in Brookline, in the Commonwealth of Massachusetts and in Boston, in said Commonwealth to their five sons as tenants in common in fee simple. On January 6, 1921, Julia Coolidge died, leaving a will which was duly allowed by the probate court for Norfolk County in said Commonwealth of Massachusetts. On February 2, 1921, letters testamentary were issued to the plaintiffs, who were named in said will as the executors thereof, and the plaintiffs now, as at all times since, are such executors. The plaintiffs as such executors made due return of the value of the estate, etc., as required by section 404 of the revenue act of 1918. The Com-
7 missioner of Internal Revenue, assuming to treat the real estate above mentioned as a part of the gross estate of the testatrix within the meaning of said revenue act, assessed with respect to said real estate a tax in the sum of $17,635.85 and demanded payment of the same. On June 8, 1923, the plaintiffs paid to the defendant (in his capacity of collector of internal revenue of the United States for the District of Massachusetts) under written protest said sum of $17,635.85 together with $1,087.13 by way of interest thereon (making a total of $18,722.98) and thereafter seasonably filed with said commissioner a claim for the refunding of the amount so paid. On November 7, 1923, said commissioner rendered a decision disallowing said claim in its entirety upon the ground that said Julia Coolidge must be deemed to have made a transfer of said real estate intended to take effect in possession and enjoyment at her death. Said tax was erroneously and illegally assessed and payment of said amount of $18,722.98 was erroneously and illegally exacted and said claim for refund was improperly disallowed, (1) because said Julia Coolidge did not within the meaning of section 402 of said revenue act at any time make any transfer of the real estate in question or at any time create any trust with respect to the same in contemplation of or intended to take effect in possession or enjoyment

at or after her death, and (2) because all interests created by the above-mentioned deeds had become irrevocable and absolutely vested prior to the enactment of said revenue act, so that, if said section 402 is construed as purporting to impose a tax with respect to the transfer of any interests created by said deeds, it is repugnant to the Constitution of the United States and especially to subdivision 4 of section 9 of Article I thereof and to the fifth amendment thereto. The defendant therefore owes the plaintiffs said sum of $18,722.56, with interest thereon from June 8, 1923.

Count 3. The defendant owes the plaintiffs $36,799.37 for money received by the defendant to the plaintiffs' use and interest thereon from June 8, 1923.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Plaintiffs.

We hereby assent to the allowance of the above motion.

ROBERT O. HARRIS,
U. S. Atty.
By ALBERT F. WELSH,
Asst. U. S. Atty.

8 Bill of particulars (accompanying count 3)

1. Money received by the defendant from the plaintiffs on account of an estate tax erroneously and illegally assessed with respect to certain property alleged to be a part of the gross estate of Julia Coolidge, the plaintiffs' testatrix, and paid by the plaintiff to the defendant under protest	$36,799.37
2. Interest on $36,799.37 from June 8, 1923, to January 10, 1924	1,300.24
3. Total due January 10, 1924	38,099.61

In United States District Court

Minute entry of order allowing motion to amend declaration

On the said 12th day of April, the aforementioned motion to amend declaration was allowed by the court, the honorable Elisha H. Brewster, district judge, sitting.

This cause was thence continued from term to term to the September term, A. D. 1924, when, to wit, October 3, 1924, the following agreed statement of facts was filed:

In United States District Court

Statement re agreed statement of facts

(Memorandum: Copy of agreed statement of facts is here omitted, as it forms part of the defendant's bill of exceptions and will be found hereafter recorded. James S. Allen, clerk.)

On the 20th day of October, A. D. 1924, the following substituted request for instructions was filed by the defendant:

In United States District Court

Statement re defendant's substitute request for instructions

(Memorandum: Copy of defendant's substitute request for instructions is here omitted, as it forms part of the defendant's bill of exceptions and will be found hereafter recorded. James S. Allen, clerk.)

In United States District Court

Minute entries

Thereupon, it was ordered by the court that the second request for instructions be granted, all others being denied.

This cause was thence continued to the December term, A. D. 1924, when, to wit, January 28, 1925, a jury was duly empanelled to try the issue, the honorable Elisha H. Brewster, district judge, sitting as aforesaid.

This cause was thence committed to said jury, who, after hearing all matters and things concerning the same, returned the following verdict:

In United States District Court

Verdict

January 28, 1925

The jury find for the plaintiffs, and assess damages in the sum of forty thousand four hundred seventeen dollars and ninety-eight cents ($40,417.98).

FRANK T. SMITH, *Foreman.*

On the 14th day of February, A. D. 1925, a draft bill of ex-
9 ceptions was filed by the defendant.

In United States District Court

Minute entry of order settling bill of exceptions

This cause was thence continued to the present March term, A. D. 1925, when, to wit, April 3, 1925, a substituted bill of exceptions is filed by the defendant and allowed by the court.

In United States District Court

Minute entry of motion for entry of judgment

On the said 3rd day of April, a motion for entry of judgment is filed and allowed.

In United States District Court

Minute entry of judgment

It is thereupon, to wit, April 3, 1925, considered by the court that the said Harold J. Coolidge and Augustus P. Loring, plaintiffs, recover of the said Malcolm E. Nichols, collector, defendant, the sum of forty thousand eight hundred sixty two dollars and fifty-seven cents ($40,862.57) damages, and their costs of suit taxed at

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10 In United States District Court

Substitute bill of exceptions

Filed and allowed April 3, 1925

At the trial of the above entitled action the plaintiffs introduced in evidence the following agreement:

AGREED STATEMENT OF FACTS

It is hereby agreed solely for the purposes of the trial of the above entitled action that the facts hereinafter stated may be treated as in evidence without further proof, reserving to either of the parties the right to introduce further evidence.

1. Julia Coolidge (wife of J. Randolph Coolidge) a citizen of the United States and a resident of Brookline in the county of Norfolk and Commonwealth of Massachusetts died on January 6, 1921, leaving a will which was duly allowed by the probate court for said county on February 2, 1921.

2. On the last mentioned date letters testamentary were issued to Harold J. Coolidge and Augustus P. Loring, the plaintiffs in this action, who were named in said will as the executors thereof and said plaintiffs now, as at all times since said date, are such executors, duly appointed and acting.

3. The plaintiffs as such executors made return of the value of the decedent's estate, etc., as required by section 404 of the revenue act of 1918.

4. The value of the decedent's gross estate was determined in accordance with the provisions of said revenue act (exclusive of the property transferred as stated below) to be $180,184.73. The amounts allowable as deductions under the provisions of said revenue act were in the aggregate $77,747.74.

11 5. On July 29, 1907, the decedent and her husband each in his or her own right transferred certain property to trustees who upon the same day executed, acknowledged and delivered a declaration of trust. Said transfer was voluntary and was not a bona fide sale, for a fair consideration in money on money's worth. The follow-

ing is a true copy of the declaration of trust which was recorded in the registry of deeds for Suffolk County, Massachusetts, on the day of its execution:

Declaration of trust

Whereas J. Randolph Coolidge of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, has by his deed of even date herewith conveyed certain real estate situated in Boston, county of Suffolk and Commonwealth aforesaid, to wit: A parcel of land, with the buildings thereon numbered 19 to 25 High Street, 175 to 179 Federal Street, and 150 to 152 Sumner Street in said Boston, to Augustus P. Loring of Beverly, county of Essex and Commonwealth aforesaid to the use of the said J. Randolph Coolidge, and of the said Augustus P. Loring and of Harold J. Coolidge of said Boston, and the survivor of them, in trust upon certain trusts; and

Whereas Julia Coolidge of said Brookline, wife of the said J. Randolph Coolidge, has by her deed of even date herewith conveyed certain real estate situated in said Boston, to wit: Two several parcels of land, with the buildings thereon, one of them being numbered 62 to 64 Sumner Street, and the second numbered 26 to 30 on Federal Street and 127 on Congress Street, in said Boston, to the said Augustus P. Loring to the use of the said J. Randolph Coolidge, Augustus P. Loring and Harold J. Coolidge, and the survivor of them, in trust upon the same trusts; and

Whereas the said J. Randolph Coolidge and the said Julia Coolidge have each of them by an instrument executed on the twenty-ninth day of July, 1907, assigned and transferred certain personal property as described in the schedule annexed to said instruments, to the aforesaid J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge, to hold as trustees upon the same trusts; and

12 Whereas the said J. Randolph Coolidge and Julia Coolidge may prior to the first of September, 1907, convey or transfer other real estate or personal property to the said trustees to be held upon the same trusts; therefore, be it known, that we, the above-mentioned J. Randolph Coolidge, Augustus P. Loring, and Harold G. Coolidge, do hereby declare that we do hold upon the following trusts, the said real estate and personal property herein referred to, and such other property as may be conveyed or assigned to us prior to September 1, 1907, to hold upon the terms of this trust, together with all accumulations and accretions of the trust fund hereby created, and all property substituted for the original fund under the powers herein given:

1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge four sevenths ($^4/_7$) and three sevenths ($^3/_7$) respectively to each so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust prop-

erty among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share.

2nd. The trustees shall have full power to make, vary, and change investments, and may invest in such real estate, personal property, stocks, bonds and other securities or property as in their opinion are proper investments for this trust fund.

3rd. They may sell any or all the trust property original accruing or substituted, at such times, in such manner, and for such considerations as they think fit, and may convey the same in fee or for
13 any less estate, and no purchaser shall be required to see to the application of the purchase money paid by him to the trustees or either of them.

4th. They may, in their uncontrolled discretion let or lease the real estate on short or long leases, or on building leases, part of the consideration for which is the improvement of the premises; and no lessee shall be liable for the application of any payment of money made to the trustees or any of them.

5th. They may improve, alter, or rebuild the trust buildings, or build new buildings on the trust lands or on land acquired for that purpose, and may make contracts binding the trust property for the purpose of carrying out any of their powers; but they shall not bind the beneficiaries of the trust, nor need they bind themselves personally.

6th. They may determine what receipts and payments shall be charged or credited to income or principal, and their determination made in good faith shall be final.

7th. They may employ such brokers, engineers, clerks, collectors, agents, or attorneys as they see fit, and shall not be liable for their misbehavior.

8th. They shall account to the beneficiaries once a year, and shall be entitled to receive as compensation for their services five per cent upon the gross amount of the income, and such compensation for extra services as a majority of those beneficiaries who are sui juris shall approve.

9th. All the powers given to the trustees named shall pass to the survivors or survivor and to successors or successor in the trust. At any time when there are three or more trustees in office, any of the trustees may delegate all his powers and authority to the other trustees by an instrument under seal duly recorded, which shall remain in force until revoked by an instrument similarly executed and re-

corded, provided that such delegated power shall not be exercised by less than two trustees.

10th. Any vacancies in the number of the trustees may be filled or an additional trustee or trustees may be appointed by the trustees or trustee in office with the assent of the majority of the bene-
14 ficiaries who are sui juris. If there are no trustees in office, then a trustee or trustees may be appointed by not less than three-fourths of the beneficiaries who are sui juris; and all appointments made under the powers given trustees or beneficiaries by this clause shall be made by an instrument in writing signed and sealed by the parties making the appointment and acknowledged by at least one of them. If no appointment is so made within thirty days from the date when there has ceased to be a trustee in office, any party in interest may apply to the probate court for Suffolk County to appoint a new trustee or trustees.

11th. No trustee hereunder shall be required to give a bond for the faithful performance of his duties, nor shall any trustee be liable for the acts or defaults of another trustee; but each trustee shall be liable for his own willful acts or defaults only.

In witness whereof we have hereunto set our hands and seals this twenty-ninth day of July 1907.

J. Randolph Coolidge.
Augustus P. Loring.
Harold J. Coolidge
[and each a seal].

We, the undersigned J. Randolph Coolidge and Julia Coolidge assent to the above declaration of trust.

J. Randolph Coolidge.
Julia Coolidge.

Commonwealth of Massachusetts.
Suffolk, ss:

Boston, *July 29, 1907.*

Then personally appeared the above named J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge and acknowledged the foregoing instrument to be their free act and deed before me,

Harold D. Apollonio,
Justice of the Peace.

A true copy of an instrument left for record with Suffolk deeds July 29, 1907, at four o'clock and twenty-seven minutes P. M.

Attest:

(Signed) Wm. T. A. Fitzgerald,
Register.

15 6. Of the property conveyed to trustees as aforesaid the decedent furnished substantially three-sevenths and her husband four-sevenths.

7. On April 6, 1917, the decedent and her husband executed, acknowledged, and delivered an assignment of all their interest in the trust fund and all their right to receive the income therefrom. The following is a true copy of said assignment:

Assignment

Whereas J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts, did by certain instruments dated July 29, 1907, convey certain real estate and personal property belonging severally to them to J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge in trust for certain purposes, and

Whereas a certain declarstion of trust signed by the said J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge as trustees, and assented to by the said J. Randolph Coolidge and Julia Coolidge, dated on said July 29th, 1907, and recorded in Suffolk Deeds Book 3227, page 260, sets forth the purposes of said trust to be as follows:

To pay the income from the trust fund in certain proportions to the said J. Randolph Coolidge and Julia Coolidge so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following named persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, junior, John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, and

Whereas the said J. Randolph Coolidge and Julia Coolidge now desire to transfer and assign all their title and interest in and to the income of said trust fund in equal shares to their said five children, who are now all living.

Now then, we, the said J. Randolph Coolidge and Julia Coolidge in consideration of one dollar and other good and valuable
16 consideration to us paid by the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, the receipt whereof is hereby acknowledged, do hereby transfer, convey, and assign to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, in equal shares, all our interest in said trust fund, and all our right to receive the income therefrom, including additions thereto and any accrued income which has not already been paid over to us.

To have and to hold the same to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, their executors, administrators, and assigns forever.

And we hereby request and direct Harold J. Coolidge and Augustus P. Loring, the present trustees of said fund, henceforth to pay over the income to our said five children in accordance with this assignment.

In witness whereof we hereunto set our hands and seals this sixth day of April, 1917.

(Signed) J. RANDOLPH COOLIDGE. [SEAL.]
" JULIA COOLIDGE.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *April 6, 1917.*

Then personally appeared the above named J. Randolph Coolidge and Julia Coolidge, and acknowledged the foregoing instrument by them signed to be their free act and deed.

Before me, (Signed) HOWARD S. PATTERSON
Justice of the Peace.

APRIL 6th, 1917.

We, the undersigned, being the present trustees of the above-mentioned trust fund, hereby acknowledge the receipt of notice of the above assignment.

(Signed) HAROLD J. COOLIDGE,
AUG. P. LORING.

17 8. The Commissioner of Internal Revenue upon review and audit of the return filed by the executors as aforesaid increased the gross estate by adding thereto the value as of the date of death of Julia Coolidge (which value was $432,155.35) of that part of the trust property which was furnished by her as aforesaid, although as a result of changes in investments, etc., much of that property was no longer held by the trustees in specie at the time of her death.

9. By deeds dated May 18, 1917, Julia Coolidge conveyed two parcels of real estate situated respectively in Brookline in the Commonwealth of Massachusetts and in Boston in said Commonwealth to her five sons as tenants in common in fee simple.

10. The deed of the Brookline property was executed, acknowledged, and delivered on May 18, 1917, and was recorded in the Registry of Deeds for Norfolk County, Massachusetts, on May 19, 1917. This deed (omitting the description of the premises) reads as follows:

"We, J. Randolph Coolidge, of Brookline, in the county of Norfolk, Massachusetts, and Julia Coolidge, his wife, in her right, for consideration paid, grant to J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, all of said Brookline, Harold J. Coolidge, of Boston, Suffolk County, and Julian L. Coolidge, of Cambridge, Middlesex County, with warranty convenants the land in Brookline with the buildings thereon situated on Boylston Street, bounded and described as follows:

[Description immaterial.]

"Witness our hands and seals this 18th day of May 1917.

"(Signed) J. RANDOLPH COOLIDGE. [SEAL.]
"(Signed) JULIA COOLIDGE. [SEAL.]"

11. At the time the above-mentioned deed was executed the grantees therein named executed and delivered a lease, which reads as follows:

"This indenture, made this day of May in the year one thousand nine hundred and seventeen between J. R. Coolidge,
18 jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, of the first part, and J. Randolph Coolidge and Julia Coolidge of the second part, witnesseth:

"That the said party of the first part doth hereby demise and leave unto the said party of the second part the premises known as 'Hillfields,' Chestnut Hill, Brookline, Massachusetts.

"To have and to hold the same for the term of one year beginning with the day of May, 1917.

"Yielding and paying therefor rent at the annual rate of one dollar.

"And the lessor hereby covenants with the lessee that they shall peaceably hold and enjoy the said premises as aforesaid.

"And the lessees hereby covenant with the lessors that they will keep the buildings fully insured against damage by fire and that they will pay all taxes assessed against the premises.

"And the lessee further covenants with the lessor that he will pay the said rent in manner aforesaid; and also all water rates to which said premises or any part thereof may become liable during the said term and all charges for light and power supplied in the leased premises during said term; that he will not without the consent in writing of the lessor, assign this lease, nor underlet the whole or any part of said premises, nor make or suffer any alterations or additions in or to the same; that he will save the lessor harmless and indemnified from and against all loss, liability, or expense, that may be incurred by reason or any accident with the machinery, hatchways, elevators, gas, water, or other pipes, or from any damage, neglect, or misadventure arising from, or in any way growing out of, the use, misuse, or abuse of water, or from the bursting of any pipes, or from neglect in the use of coal-holes and covers, or in not removing snow and ice from the sidewalks; that he will keep whole and in good order all glass, pipes, faucets, water fixtures, machinery, etc., under his control and in his use, and leave the same in good condition at the termination of this lease, reasonable wear excepted; and he acknowledges that the same are now whole and in good condition; that he will allow the lessor and his agents at reasonable times to enter upon same premises and examine the condition thereof and make necessary repairs, if not otherwise provided for; that he will not require the lessor to make any repairs; and that he will keep all and singular the said premises in such repair as the same are in at the commencement of said term or may afterwards be put in by the lessor, reasonable use and wearing thereof and damage by fire or other unavoidable casualties only excepted; and at the end of

said term will peaceably deliver up to the lessor the said premises, together with all future erections or additions upon or to the same, in such repair as aforesaid, and vacant and unincumbered and in good and tenantable order and condition.

"The lessee further covenants that he will conform to all rules and regulations and obey all orders of all State and municipal boards or departments respecting the leased premises during said term.

"The lessee shall have the right to cut down trees, to remove any plants and shrubs, etc., and to relocate any paths or driveways.

19 "Provided always, and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the lessee, or of those claiming under him, or in case the estate hereby created shall be taken from him by process of law, or a petition in bankruptcy or insolvency has been filed by or against the lessee the lessor may while the default or neglect continues, or at any time after such taking by process of law, or filing of said petition and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, enter upon the premises and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the lessee and his effects.

"This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contrary at least one month before the end of the original term or any renewal thereof.

"No omission on the part of the lessor to insist upon the performance of any obligation, or covenant of the lessee, or enforcement of any right reserved to the lessor, shall be deemed to be a waiver of such obligation, covenant, or right, in that or any other instance; nor a waiver of any other obligation, covenant, or right for the lessor's benefit contained in said lease.

"The word 'lessor' wherever used in this instrument comprises heirs, successors, and assigns; and the word 'lessee' means lessee or lessees, and comprises executors, administrators, and assigns.

"In witness whereof the said parties hereunto, and to another instrument of like tenor, set their hands and seals on the day and year first above written.

"(Signed) J. RANDOLPH COOLIDGE, JR. [SEAL.]
"JOHN GARDNER COOLIDGE [SEAL.]
"JOHN F. MOORE, Atty.
"ARCHIBALD CARY COOLIDGE [SEAL.]
"HAROLD J. COOLIDGE [SEAL.]
"JULIAN L. COOLIDGE [SEAL.]"

12. The deed of the Boston property was executed, acknowledged and delivered on May 18, 1917, and was recorded in the registry of

deeds for Norfolk County, Massachusetts, on the same day. This deed (omitting the description of the premises) reads as follows:

"We, J. Randolph Coolidge, of Brookline, in the county of Norfolk, Massachusetts, and Julia Coolidge, his wife, in her right, for consideration paid, grant to J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, all of said Brookline, Harold J. Coolidge, of Boston, Suffolk County, and Julian L. Coolidge, of Cambridge, Middlesex County, with warranty covenants the land in Boston with the buildings thereon now numbered 130
20 Beacon Street and bounded and described as follows:

[Description immaterial.]

"Witness our hands and seals this 18th day of May, 1917.

"(Signed) J. Randolph Coolidge, Jr. [SEAL.]
" " Julia Coolidge. [SEAL.]

13. At the time the last-mentioned deed was executed the grantees therein named executed and delivered a lease of the granted premises identical in tenor (except as to the description of the granted premises and except the provision reading, "The lessee shall have the right to cut down trees, to remove any plants and shrubs, etc., and to relocate any paths or driveways" is omitted) with the above-mentioned lease of the Brookline property.

14. Both the parcels of real estate above mentioned were for many years prior to May 18, 1917, owned by the decedent in her own right and occupied by her and her husband as places of residence. When the aforesaid leases were made it was understood by the parties that, should the lessees desire to continue to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the lifetime of the lessees or either one of them.

15. The conveyances of said parcels of real estate were voluntary and neither of them was a bona fide sale, for a fair consideration in money or money's worth. The value of the two parcels at the time of the decedent's death was $274,300.

16. The Commissioner of Internal Revenue upon review and audit of the return filed by the executors increased the gross estate by adding thereto the value as of the date of the decedent's death of the two parcels of real estate above mentioned.

17. By reason of the inclusion in the decedent's gross estate of the value of the trust property as set forth in paragraph 8 of this agreement and the inclusion of the value of the real estate as set forth in paragraph 16 the Commissioner of Internal Revenue assessed an additional tax in the sum of $34,662.65 which to-
21 gether with interest thereon amounting to $2,136.73, the plaintiffs on June 8, 1923, paid under written protest and under duress. Thereafter the plaintiffs duly filed a claim for a refund of the tax and interest so paid under protest and duress, which claim the Commissioner of Internal Revenue rejected prior to the institution of this suit.

18. The amount of additional tax and interest which would have been due had the value of the property transferred by the decedent in trust as set out in paragraph 5 of this agreement but not the value of the real estate conveyed as set out in paragraph 9 of this agreement been included in the gross estate would have been $18,-106.60. The amount of additional tax and interest if the value of the said real estate but not the value of the said trust property had been included in the gross estate would have been $9,507.03.

19. No part of the aforesaid additional tax or interest has been refunded.

(Signed) STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for plaintiffs.
ROBERT O. HARRIS, *U. S. Atty.*,
ALBERT F. WELSH, *Asst. U. S. Atty.*,
Attorneys for defendant.

No other evidence was offered by either party.

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

The plaintiffs presented the following requests for instructions:

1. The payment referred to in the first count of the declaration was exacted unlawfully.

2. The payment referred to in the second count of the declaration was exacted unlawfully.

3. Upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38 with interest at six per cent. from June 8, 1923, to the date of the verdict.

4. If the plaintiffs are entitled to recover the payment referred to in the first count of the declaration, but not that referred to in the second count, the verdict should be for the plaintiffs in the sum of $27,292.35 with interest at six per cent. from June 8, 1923, to the date of the verdict.

22 5. If the plaintiffs are entitled to recover the payment referred to in the second count of the declaration, but not that referred to in the first count, the verdict should be for the plaintiffs in the sum of $18,692.78 with interest at six per cent. from June 8, 1923, to the date of the verdict.

6. The property referred to in the first count of the declaration as having been conveyed by Julia Coolidge to trustees was not a part of her "net estate" within the meaning of the revenue act of 1918.

7. The real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the revenue act of 1918.

8. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

9. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

10. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

11. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

12. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

23 13. If the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the second count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant presented the following requests for instructions:

1. That section 402 (c) of the revenue act of 1918 is constitutional in its provision that there shall be included in the gross estate of a decedent dying after the passage of the act the value at the time of death of all interests in property, real or personal, tangible or intangible, wherever situated, with respect to which the decedent has prior to the passage of the act created a trust or made a transfer intended to take effect in possession or enjoyment at or after the death of the decedent.

2. That the trust created by Julia Coolidge in her life-time was intended to take effect in possession or enjoyment at or after her death and the value of the interest with respect to which she created such trust was a part of her gross estate under the aforesaid act.

3. That the subsequent assignment by Julia Coolidge of her share of the income from and of her interest in the trust mentioned in the pleadings did not make it improper to include in her gross estate the value of the interest with respect to which she had previously created a trust intended to take effect at or after her death as set forth in the court's second instruction.

4. That the transfers of real estate to her children by Julia Coolidge in her life-time were transfers intended to take effect in possession or enjoyment at or after her death within the meaning of the aforesaid act.

5. That the value to be included in the gross estate of Julia Coolidge under the provisions of the aforesaid act, is the value as of the time of her death of the real estate transferred to her children and of the real estate and personalty transferred to the trustees.

24 5½. That the findings of the commissioner as to the values of the interests to be included in the gross estate are prima facie correct and that there is no evidence in this case to overcome such prima facie showing.

6. That under the pleadings and evidence in this case the plaintiffs are not entitled to recover and your verdict must be for the defendant.

CHARGE TO JURY

The court charged the jury as follows:

Gentlemen of the jury:

This is an action of contract brought by the plaintiffs, as executors under the will of Julia Coolidge, late of Brookline, in this Commonwealth, against Malcolm E. Nichols, as collector of internal revenue for the district of Massachusetts. The suit is brought to recover a sum of money paid to the collector by the executors under protest, in response to a demand for an additional tax assessed upon the estate of Julia Coolidge. The plaintiffs claim the estate is not liable for this additional tax.

In this case the only evidence before you is that included in the agreed statement submitted by counsel. None of the material facts are in controversy, therefore no issue of fact is presented. Rather, this is a case where it becomes necessary for the court to determine as a matter of law whether, upon these facts, the plaintiffs are entitled to recover, and if so in what sum. The amount involved is considerable, and the questions of law calling for consideration involve the construction and validity of an act of Congress. I have, therefore, given much thought to the arguments and brief of counsel, have examined the authorities submitted and have reached certain conclusions which I will undertake to state as clearly as I may.

Since the disposition of this case depends upon the determination of questions of law rather than issues of fact, I shall depart somewhat from my usual practice in jury trials and elaborate somewhat the reasons upon which these conclusions are based.

From the undisputed evidence, it appears that on July 29, 1907, Julia Coolidge joined with her husband, J. Randolph Coolidge, in an instrument of transfer whereby she and her husband trans-

25 ferred and conveyed to trustees named certain real and personal property. The trustees on the same day duly executed a declaration of trust respecting the property so conveyed, together with all accumulations and accretions and all property substituted for the original fund, which trust provided that the trustees should pay the net income—three-sevenths to Julia Coolidge and four-sevenths to J. Randolph Coolidge "so long as they both live and to pay the whole of said net income to the survivor; and upon the

death of the survivor to distribute equally the trust property among the following persons, who are children of said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predecease to those who would be entitled to take his intestate property under the statute of distribution in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share."

On April 6th, 1917, Julia Coolidge and J. Randolph Coolidge joined in another written instrument whereby they transferred, conveyed and assigned to J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Carey Coolidge, Harold J. Coolidge, and Julian L. Collidge, in equal shares, all their interests in said trust fund, and all their right to receive the income therefrom, including additions thereto and any accrued income which had not already been paid over to them, and the trustees by said instrument were requested and directed to pay the income to said five children in accordance with the assignment.

On May 18th, 1917, Julia Coolidge executed two deeds
26 whereby she conveyed to the five sons already named two certain parcels of real estate, one situated in Boston and the other in Brookline. The deeds were in statutory short form of deeds with warranty covenants obtaining in Massachusetts and were recorded on May 18th and May 19th, 1917, respectively.

At the time these deeds were given, the grantees named therein executed and delivered a lease covering each of the properties conveyed which, in all material respects, were identical except as to description. Each lease was for the term of one year, and the rent reserved was at the annual rate of $1.00. Each lease contained the usual covenants found in the form commonly used in Massachusetts and contained also these pertinent provisions:

"This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contract at least one month before the end of the original term or any removal thereof."

Both parcels of real estate conveyed by the deeds were for many years owned by the decedent in her own right and occupied by her and her husband as places of residence. When the leases were made it was understood by the parties that should the lessees desire to continue to occupy the residences on the leased premises for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the life of the lessees or either of them.

The conveyance to the trustees and the conveyance of the Boston and Brookline real estate were not bona fide sale for a fair considera-

tion in money or moneys' worth within the meaning of the provisions of acts of Congress to which your attention will be presently directed.

Julia Coolidge died January 6th, 1921, leaving a will duly admitted to probate in the county of Norfolk in this Common-
27 wealth. The plaintiffs are executors of that will. Mrs. Coolidge left a gross estate, exclusive of the property to which I have called attention, of over $180,000.00 and a net estate of over $100,000.00. The Commissioner of Internal Revenue increased the gross estate by adding thereto $432,155.35, the value as of the date of the death of Julia Coolidge of that part of the trust property which was deemed to have been conveyed by her in trust, although, as a result of changes in investment, much of the property originally received by the trustees was not held by them in specie at the time of her death. The Commissioner of Internal Revenue also included in her gross estate $272,300.00, being the value at the time of her death of the property conveyed by the two deeds already referred to.

As a result of this action on the part of the Commissioner of Internal Revenue, an additional tax was assessed against the estate, with interest amounting to $36,799.38, which sum the plaintiffs paid under protest June 8th, 1923, and plaintiffs' claim for a refund having been duly filed and having been denied by the Commissioner of Internal Revenue, this suit is brought to recover the sum paid with interest from June 8th, 1923.

The ultimate questions to be determined are these: Did the Commissioner of Internal Revenue have a right to include in the gross estate of the decedent:

(a) The value at the time of her death of the property held by the trustees under the declaration of trust heretofore mentioned, and

(b) The value of the Boston and Brookline real estate conveyed by the decedent to her five sons by the two deeds aforementioned.

In the revenue act of 1918 Congress imposed a graduated estate tax upon the transfer of the net estate of every decedent dying after the passage of the act. The tax was to be measured by the value of the net estate, which was to be determined by deducting from
28 the gross estate certain sums and charges not now necessary to enumerate. The important provisions of the law are those which define and limit the value of the gross estate for the purposes of the tax. These provisions are as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration

in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

It is claimed by the Government that the value of both the property conveyed in trust and the real estate conveyed outright came within the scope of this section as transfers made or trusts created with the intention that they should take effect in possession or enjoyment at, or after, the death of Mrs. Coolidge. I do not understand that it is claimed here that there was any completed gift inter vivos made in contemplation of death, and if there was such a claim the transfers having been made more than two years prior to the death of Mrs. Coolidge you would not be justified in finding that they were made in contemplation of death in the absence of any affirmative evidence tending to show that they were so made.

It follows, therefore, that if the value of this property, or any of it, is to be included in the gross estate it is because the facts support the contention of the Government that the transfers were intended to take effect in possession and enjoyment at or after the death of the decedent.

It becomes necessary, therefore, to determine whether (1) 29 the transfer in trust and (2) the outright conveyances of real estate, were intended to take effect in possession and enjoyment after Mrs. Coolidge's death.

I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and I will first consider the claims of the parties respecting those transfers.

The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantee did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There was

here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts.

I have reached the conclusion, therefore, that respecting the property conveyed by the deed, the facts of this case do not bring the property within the reach of the statute and that the Commissioner of Internal Revenue was without authority to include
30 the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Coolidge within the meaning of the revenue act of 1918.

The plaintiffs also claim that the transfer in trust was not one to take effect in enjoyment and possession after death within the scope of the act and, therefore, the value of the property transferred should not have been included.

In the first place, it is necessary to inquire into the nature of the estate arising as a result of the transfer of July 29th, 1907, and the assignment of April 6th, 1917. The effect of these instruments was to divest Mrs. Coolidge of all interest in the property, the sons becoming, in effect, equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents, or the survivor of them, his share would go to the next of kin. The interest of the sons, therefore, was not a contingent interest but rather a vested interest liable to be divested by death before the death of the survivor of the parent. They would not, however, come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it, until the termination of the trust, and by its terms the trust was not to be terminated until on or after the death of the decedent.

But the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, retaining no interest therein which would cease upon her death.

If I understand correctly the contentions of the plaintiffs, it is because of this fact that I am asked to instruct you, as a matter of law, that the property held in trust and referred to in the first count of the declaration was not a part of her "net estate"
31 within the meaning of the revenue act of 1918. I think, however, that this request requires me to place a construction upon the provisions of section 402 (c) somewhat too narrow. This appears when we consider the nature of the tax and the fact that the real question here is whether the value of the property so transferred shall be included in the total valuation which furnishes the measure of the tax. The tax is not laid upon the property transferred nor upon the transfer. The tax has been held to be on the right to transmit or on the transmission at the beginning. The decedent, having left an estate which is transmitted upon her death, it has become taxable and in determining the amount of tax which

the estate shall pay the statute expressly provides that there shall be included in the measure of the tax the value of property "to the extent of any interest therein of which the decedent has at any time made a transfer or in respect to which he has at any time created a trust in contemplation of, or intended to take effect in possession or enjoyment at or after his death."

The term "intended to take effect in possession or enjoyment at or after his death" and the term "in contemplation of death" had both been frequently the subject of judicial definition, and it may be assumed that in drafting the act, Congress had in mind these definitions. We find that the courts had held that a transfer in trust similar to the one before us in this case, where the donor had parted with all his interest in property that was to be held in trust until on or after the death of the donor, was a transfer to take effect in possession or enjoyment on or after death. Although the income was payable to the sons, the intention of Mrs. Coolidge obviously was that the principal of the trust fund should not vest in full possession and enjoyment until after her death.

It is pointed out that we are not now dealing with a tax
32 on legacies or successions; that the tax is laid, not on the right to receive property upon death but on the right to transmit it upon death, and it is, therefore, argued that unless the decedent had some interest in the property, the transfer of which is sought to be included, it has no place in the valuation upon which the tax is to be computed; that this case should be distinguished from those cases where the courts have deemed transfers similar to the one before us subject to legacy and succession taxes. I am unable to discern any distinction in principle. If a transfer is one to take effect in possession and enjoyment after death, it may be reached under a statute imposing an estate tax. Granting, as we must, that Congress has power to levy a tax upon the net estate of a decedent, it may adopt any reasonable measure of that tax. Admittedly, it is entirely reasonable to measure the tax by the value of the property transmitted by will or by intestate laws and I do not think it can be said to be unreasonable to measure the tax also by the value of property of which a decedent during his lifetime has made a disposition which partakes of the nature of a testamentary disposition. In such a case the reasonableness of the measure would not depend on whether the decedent had reserved any interest in the property which would cease upon his death. A completed transfer inter vivos, made in contemplation of death, leaves no interest in the grantor. Whether the transmission be by will, by intestate laws or by transfers to take effect on or after or in contemplation of death the transmission bears in each case a reasonable relation to the event of death.

I am of the opinion, therefore, that the trust created by Mrs. Coolidge was a transfer to take effect in possession or enjoyment at or after her death within the meaning of the act of 1918, and that

the value of the transfer should be included in her net estate unless the retroactive provisions expressly incorporated for the first
33 time in the act of 1918 are held to be beyond the power of Congress to enact. This act provides that the value of the property so transferred shall be included, whether such transfer or trust is made or created before or after the passage of the act.

The plaintiffs in effect ask me to say to you that these provisions are unconstitutional and void so far as they apply to the property transferred in trust by this decedent.

This request gives rise to the most difficult questions of law found in this case, and one which I confess is not entirely free from doubt. A court of first instance, I take it, should be reluctant to set aside as beyond the constitutional authority of Congress a purpose clearly declared. On the other hand, we are dealing with a law imposing the burden of taxation and the authority of Congress cannot be extended by implication. In view of the construction which I have put upon the act, the rights of the parties to this litigation cannot be settled without disposing of plaintiffs' request.

You have before you a situation where the decedent during her lifetime and at a time when no tax was imposed on the transfer had entirely divested herself of all interest in the trust property which was included by the Commissioner of Internal Revenue in the gross estate. It was a completed transaction. All interests in the property had vested in others.

We have, therefore, an attempt on the part of the Government to exact an estate or indirect tax computed upon the value of property which did not constitute a part of decedent's estate but concerning which, at a time when it was not taxable, she had made a transfer that did not take effect in full possession and enjoyment until after her death. I am of the opinion that the express terms of the act providing the standard by which this tax is to be measured embraces such property. The constitutional question presented is whether it lies within the power of Congress to adopt a
34 criterion which would extend to such property transferred under such circumstances.

It has been stated that the nature of the excise or indirect tax forbids retroactive operation; that to exact a tax upon the privilege of consummating a transfer after it is completed leaves no choice in the tax payer and the tax becomes an unavoidable and absolute demand, thereby losing its essential characteristics as an excise or indirect tax, and becomes in effect a direct assessment upon the property itself simply because of ownership, and as such is unconstitutional unless apportioned among the states.

Ordinarily, a tax which cannot be shifted or the payment avoided is deemed a tax upon the holder thereof in respect to his ownership of property and, therefore, a direct tax; but after a careful examination of the authorities on this point I am not prepared to state it as my opinion that Congress has not authority to give retroactive effect to a law providing an indirect tax.

If these express retroactive provisions now under consideration are to be deemed unconstitutional, as applied to the facts before us, it would seem to be rather upon the ground that the attempt was an unreasonable and arbitrary exercise of the taxing power.

The powers of Congress to provide the measure of a tax laid upon a legitimate object is far-reaching and must be upheld unless it is wholly arbitrary and unreasonable. What is the test of reasonableness? I gather from the cases and from the brief filed by the Government that the reasonableness of the classification turns upon the question of whether the transfer sought to be included bears any reasonable relation to the net estate of the decedent.

It is the contention of the Government that although the defendant had, prior to the passage of the act of 1918, parted with all her interest in the property, her death was a "generating source"
85 of the possession and enjoyment and that, therefore, a reasonable basis existed for including the value of the property in the measure of the tax. As I do not accept the premise as sound, I am unable to adopt the conclusion. Nothing passed upon the death of Mrs. Coolidge. Upon her death no interest ceased with corresponding accretion to the living. The only possible effect of her death would be to change the relationship between the beneficiaries and the trust fund. I regard the transfers rather than her death as the "generating source" even of the enjoyment and possession.

From the agreed facts it must be admitted that the property sought to be included as a part of the decedent's estate belonged to others at the time of her death. Clearly, there must be some limitation to the power of Congress to exact a tax on one measured by property of another. I take it the Government would not seriously contend that an estate tax could be levied upon the estate of A, to be measured by the value of B's property, when neither the property of B nor the manner of its acquisition bore any reasonable relation to the subject matter of the tax.

I am unable to perceive on what grounds it could be successfully claimed that the transfer in question, or the property transferred, could be said to bear any reasonable relation to the thing taxed. If, at the time of her death, the decedent had some interest in the property which terminated by reason of said death, or if, at the time the transfer was made, it was taxable, a different situation would arise. In the case before us neither of these conditions exist. The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death because both are transfers in the nature of testamentary dispositions
86 and could be easily resorted to for the purpose of evading the tax. I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted

or exercised. When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable. Such arbitrary inclusion of property of others has been held in other jurisdiction invalid as unconstitutional.

It has been held that a State posesses no authority to tax remainder, or reversionary, interests created by deed or will prior to the enactment of the law imposing the tax on the theory that State legislatures are without power to destroy or impair the value of vested interests. It has never been suggested that the powers of the State to impose inheritance tax was inferior to that of the Federal Government. It is true that the statutes which have been held unconstitutional for this reason have imposed succession rather than estate taxes. The conclusions reached, therefore, would not be controlling but would be significant, I think, upon the question of reasonableness of classification.

I do not find that the precise question here presented, and with which I have undertaken to deal somewhat at length, has ever
37 been passed upon by our court of last resort. The inferior courts seem not to be in accord. I am fully aware of the importance of the issue raised in its effect upon the revenues of the Government and for that reason have been led to give most careful thought and study to the helpful briefs filed in the case. As a result, I have reached the conclusion that the retroactive provisions of the act of 1918, so far as they apply to a transaction entirely completed before the passage of the act, are unconstitutional and void and that, therefore, the action of the Commissioner of Internal Revenue in including as a part of her net estate the property conveyed in trust by Mrs. Coolidge is without authority.

It follows from what I have said that the plaintiffs are entitled to the instruction already referred to, namely: That if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the 1st count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

The exaction of the payments referred to in the 1st and 2nd counts of the plaintiffs' declaration being without authority I say to you, as a matter of law, that upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38, with interest at the rate of 6 per cent from June 8, 1923, to the date of verdict, which counsel agree amounts to $3,618.60.

The 1st, 2nd, 3rd, 7th, 8th, 9th, and 10th requests for instructions submitted by plaintiffs are consistent with this charge and I accord-

ingly give instructions as requested. In view of my concussions, it becomes unnecessary to consider the 4th, 5th, 11th, 12th, and 13th requests. The 6th request I deny.

Of the defendant's request for instructions, the 2nd is consistent with what I have said and is, therefore, granted. All other requests are denied.

You will, therefore, by order of court return a verdict for the plaintiffs in the sum of $40,417.98.

The plaintiffs excepted to the denial of their sixth request. The defendant excepted to the denial of his requests numbered
38 respectively 1, 3, 4, 5, 5½, and 6, to the giving of the plaintiffs' requests numbered respectively 1, 2, 3, 7, 8, 9, and 10 and to the ordering of a verdict for the plaintiffs.

The defendant, being aggrieved by the aforesaid refusals to instruct the jury as requested by him, by the giving of the aforesaid instructions requested by the plaintiffs and by the directing of a verdict in favor of the plaintiffs, brings this his bill of exceptions and prays that the same be allowed.

MALCOLM E. NICHOLS,

By his Attys.,

HAROLD P. WILLIAMS,
U. S. Atty.,
ALBERT F. WELSH,
Asst. U. S. Atty.

Order settling bill of exceptions

Allowed: 4/3/25. E. H. B., D. J.

In United States District Court

Petition for writ of error and order allowing same

Filed April 3, 1925

Now comes Malcolm E. Nichols, Collector of Internal Revenue for the District of Massachusetts, in the above entitled cause and says that on or about the third day of April, 1925, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore the defendant prays that a writ of error may issue in his behalf out of the United States Supreme Court for the correction of errors so complained of and that a transcript of the record and proceedings in this case, duly authenticated may be sent the said United States Supreme Court.

HAROLD P. WILLIAMS,
United States Attorney,
By ALBERT F. WELSH,
Assistant U. S. Attorney.

Allowed: 4/3/25. E. H. B., D. J.

39 In United States District Court

Assignments of error

Filed April 3, 1925

Now comes Malcolm E. Nichols, the plaintiff in error, and in connection with his petition for a writ of error, says that in the record, proceedings, and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to wit:

1. The court erred in instructing the jury as requested by the defendant in error that the payment referred to in the first count of the declaration was exacted unlawfully.

2. The court erred in instructing the jury as requested by the defendant in error that the payment referred to in the second count of the declaration was exacted unlawfully.

3. The court erred in instructing the jury as requested by the defendant in error that upon all the evidence the plaintiffs are entitled to recover the sum of $36,799.38 with interest at six per cent. from June 8, 1923, to the date of the verdict.

4. The court erred in instructing the jury as requested by the defendant in error that the real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the revenue act of 1918.

5. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States.

6. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to sub-section 4 of section 9 of Article I of the Constitution of the United States.

7. The court erred in instructing the jury as requested by the defendant in error that if the revenue act of 1918, according to its true construction, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent repugnant to the fifth amendment to the Constitution of the United States.

40 8. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that section 402 (c) of the revenue act of 1918 is constitutional in its provision that there shall be included in the gross estate of a decedent dying after the passage of the act the value at the time of death of all interests in property, real or personal, tangible or intangible, wherever situated,

with respect to which the decedent has prior to the passage of the act created a trust or made a transfer intended to take effect in possession or enjoyment at or after the death of the decedent.

9. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the subsequent assignment by Julia Coolidge of her share of the income from and of her interest in the trust mentioned in the pleadings did not make it improper to include in her gross estate the value of the interest with respect to which she had previously created a trust intended to take effect at or after her death as set forth in the court's second instruction.

10. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the transfers of real estate to her children by Julia Coolidge in her lifetime were transfers intended to take effect in possession or enjoyment at or after her death within the meaning of the aforesaid act.

11. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the value to be included in the gross estate of Julia Coolidge under the provisions of the aforesaid act is the value as of the time of her death of the real estate transferred to her children and of the real estate and personalty transferred to the trustee.

12. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that the findings of the commissioner as to the values of the interests to be included in the gross estate are prima facie correct and that there is no evidence in this case to overcome such prima facie showing.

41 13. The court erred in failing and refusing to instruct the jury as requested by the plaintiff in error that under the pleadings and evidence in this case the plaintiffs are not entitled to recover and the verdict must be for the defendant.

HAROLD P. WILLIAMS,
United States Attorney.

By ALBERT F. WELSH,
Assistant U. S. Attorney.

42-43 [Citation in usual form showing service on Harold J. Coolidge and Augustus P. Loring omitted in printing.]

44 [Clerk's certificate to foregoing transcript omitted in printing.]

D [Indorsement on cover:] File No. 31,091. Massachusetts, D. C. U. S. Term No. 393. Malcolm E. Nichols, collector of internal revenue of the United States, for the district of Massachusetts, plaintiff in error, vs. Harold J. Coolidge and Augustus P. Loring, executors of the will of Julia Coolidge. Filed April 28th, 1925. File No. 31,091.

INDEX

AUTHORITIES CITED

Cases—Continued. Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 88

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL Revenue of the United States for The District of Massachusetts, Plaintiff in Error

v.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, Executors of The Will of Julia Coolidge

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR PLAINTIFF IN ERROR

OPINIONS OF THE COURT BELOW

The court below did not write an opinion, but its charge to the jury is reported in 4 F. (2d), 112, and is found in the Record at pages 19 to 28. This charge directed a verdict and is in effect the opinion of the court.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered by the District Court for the District of Massachusetts on April 3, 1925. (R. 8.) A writ of error was taken under Section 238 of the Judicial Code (ch. 231, 36 Stat. 1157) as it stood before the Act of February

13, 1925 (ch. 229, 43 Stat. 936), became effective May 13, 1925, on the ground that the case involves the construction or application of the Constitution of the United States and in it the constitutionality of a law of the United States is drawn in question.

THE QUESTIONS

This case presents the question of the proper construction of Section 402 (c) of the Revenue Act of 1918, as well as the question of the constitutionality of that section. The constitutional question relates to the power of Congress to include in the gross estate of a decedent, dying after the passage of the Act, a transfer or trusts intended to take effect in possession or enjoyment at or after death, made or created prior to the passage of the Act. The question of construction turns upon the meaning of the phrase "intended to take effect in possession or enjoyment at or after his death" as used in the said section and as applied to the particular trust and particular transfer disclosed by the facts of this case.

A third question is presented by the facts, but under the ruling of the court below it was not necessary to the decision and was not decided. This question is whether the trust property included in the gross estate should be valued as of the date of death or as of the date of the transfer.

STATEMENT

This action was instituted in the court below on February 7, 1924 (R. 2), by Harold J. Coolidge and Augustus P. Loring, executors of the will of Julia Coolidge, deceased, as plaintiffs, against Malcolm E. Nichols, Collector of Internal Revenue of the United States for the District of Massachusetts, to recover an additional Federal Estate Tax of $36,-799.37, together with interest thereon alleged to have been erroneously assessed and collected as a Federal Estate Tax imposed upon the transfer of the net estate of Julia Coolidge under the Revenue Act of 1918 and paid by the plaintiffs below under protest and duress. On April 12, 1924, the plaintiffs below filed, with leave of court, a substitute declaration (R. 4), to which the defendant below filed a general denial (R. 3). The case was tried on an agreed statement of facts, which is found in the Record at pages 8 to 17. The court directed a verdict in favor of the plaintiff below (R. 28), and upon the verdict (R. 7) judgment was entered in favor of the plaintiff below (R. 8). A writ of error to this Court was allowed on the third day of April, 1925. (R. 1, 28.)

From the stipulation of facts it appears that Julia Coolidge, a citizen of the United States and a resident of Brookline, Massachusetts, died on the sixth day of January, 1921. Her executors, in pursuance of the requirements of Section 404 of the Revenue Act of 1918, made return for Federal

Estate Tax purposes but did not include in this return the value of certain property which the decedent in her lifetime had conveyed to trustees and certain other property which in her lifetime the decedent had conveyed to her children. The Commissioner of Internal Revenue, upon review and audit of the return filed by the executors, determined that the value of the property so transferred should be included in the gross estate, and, accordingly, assessed the additional tax sued for in this case.

The two transactions in dispute are separate and distinct, and the first was as follows:

On July 29, 1907, the decedent and her husband, being then the owner each of certain property, transferred without consideration the said property to trustees, who upon the same day executed, acknowledged, and delivered a declaration of trust. (R. 9.) The terms of this trust require the trustees to distribute the income from the property to the husband and wife in proportion to their contributions of capital; that is, Julia Coolidge, the decedent, who contributed three-sevenths of the capital, was to be paid three-sevenths of the net income during her lifetime, and J. Randolph Coolidge, her husband, who contributed four-sevenths of the capital, was to be paid four-sevenths of the income during his life. The survivor was to receive the entire net income during his/her life. After the death of the survivor the corpus

was to be distributed equally amongst the five children of the founders of the trust or representatives of such of the children as might be then dead. Ten years after the founding of this trust and on April 6, 1917, the decedent and her husband assigned all their interest in the trust fund and their respective rights to receive the income therefrom to their five children. (R. 12.) The time for distribution of the corpus was not changed by this assignment.

Under these facts the Commissioner of Internal Revenue determined that the value of the property contributed by the decedent as of the date of her death should be included in her gross estate for the purpose of Federal Estate taxation. The executors dispute this determination on the grounds:

1. That although the trust as originally created was one intended to take effect in possession or enjoyment at or after decedent's death, the assignment of the decedent's life interest vested the possession and enjoyment prior to her death; and

2. That the trust having been created prior to the passage of the Revenue Act, the value of the property can not constitutionally be included in the decedent's gross estate, although the statute expressly requires that it shall be included.

The court below construed the statute to include this transaction, but held that so construed, the statute is invalid.

The other transaction, having no connection with the one above described, was as follows:

The decedent made another transfer by deeds dated May 18, 1917. (R. 13.) This transfer was without consideration and included two parcels of real estate in Massachusetts on which were dwellings occupied by the grantors. The two deeds purported to convey the absolute fee simple title to the decedent's five children. At the same time the deeds were executed the grantees executed leases to the decedent and her husband at an annual rental of one dollar for the term of one year, with a provision for the annual renewal of the lease unless notice to the contrary was given by either party. (R. 14.) The real understanding between the parties at the time these leases were executed was that should the lessees desire to continue to occupy the residences on the lessors' estates for the purposes of residing therein the leases would continue during the lifetime of the lessees or either of them, and to this extent the provision in the leases for termination by the lessors was inoperative. (R. 16, par. 14.) The lease provides that the lessees shall not be liable for waste and shall pay all expenses in connection with the properties.

Under these circumstances the Commissioner of Internal Revenue determined that the value of the properties transferred as of the date of the decedent's death should be included in her gross estate, because they were transfers intended to take effect in possession or enjoyment at or after her death. The plaintiffs contend that such inclusion is not

proper for the reasons (1) that the transfers were not intended to take effect in possession or enjoyment at or after the decedent's death, and (2) that, if they were, such transfers, having been made prior to the passage of the Revenue Act of 1918, although after the passage of the Revenue Act of 1916, could not constitutionally be included in the decedent's gross estate, despite the fact that the statute expressly provides that they shall be so included.

The court below held this transaction was not within the statute.

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, provides, so far as applicable to this case, as follows:

> SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * * [Here follow the rates applicable.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

1. The court erred in directing the jury to return a verdict for the plaintiffs in the sum of $36,799.38 with interest at six per cent from June 8, 1923, to the date of the verdict. (R. 29.)

2. The court erred in holding that the real estate referred to in the second count of the declaration was not a part of the "net estate" of Julia Coolidge within the meaning of the Revenue Act of 1918 (R. 29), and that said transfers were not intended to take effect in possession or enjoyment at or after her death.

3. The court erred in holding that if the Revenue Act of 1918, according to its true construc-

tion, purports to authorize the exaction of the payment referred to in the first count of the declaration, it is to that extent void because not an exercise of any power granted to Congress by the Constitution of the United States (R. 29), and because it is to that extent repugnant to subsection 4 of section 9 of Article I of the Constitution of the United States (R. 29), and to the Fifth Amendment to the Constitution of the United States (R. 29).

SUMMARY OF THE ARGUMENT

The trust created by Mrs. Coolidge, as modified by the subsequent assignment of her life estate, is within the meaning of Section 402 (c) of the Revenue Act of 1918 because the words of that Act provide for the inclusion in the gross estate of the value of the interest which the decedent transferred without regard to that which she retained, if any. The test by which the propriety of including the property in the gross estate is determined is whether the actual possession or enjoyment of the property was deferred until at or after the donor's death.

This construction of the phrase "intended to take effect in possession or enjoyment at or after death" was a settled judicial construction long prior to the passage of the Revenue Act of 1918. The courts of many States in construing this phrase as used in State Inheritance Tax Laws had settled its construction, and it is to be presumed

that in using this phrase Congress intended that construction.

Moreover, both the purpose and spirit of the Act require that such trusts be included. Congress did not insert this provision relating to trusts intended to take effect in possession or enjoyment at or after death for the purpose of preventing evasions of the Act because the provision is made applicable to transactions completed prior to the time when such transactions involved any question of Federal taxation, nor did Congress include the creation of such trusts for the purpose of taxing transfers which took place at death. This is shown by the fact that it included other classes of property, for instance, gifts in contemplation of death, general powers of appointment, and receipts of insurance money which clearly were not transferred from the decedent at his death. What Congress intended was to provide a measure for the tax which would operate with equality upon all those who made testamentary dispositions of their property whether such dispositions were by will or intestacy or only in effect testamentary.

In the other transaction, the conveyance of real estate constituting the dwellings, the decedent retained a life interest, and the grantees were not intended to have either possession or enjoyment during the grantor's lifetime. Although the deeds were absolute on their faces and the leases by their terms were terminable by the lessor at the end of

any year, the true nature of the transaction is to be determined by reference to the collateral agreement and understanding between the parties. This understanding was that the grantor should have the use and possession of the property during her life. The agreement, conflicting with the terms of the lease, shows that the lease as drawn did not reflect the true agreement and was subject to reformation. Under such an agreement the grantor had possession and the grantees did not. The transfer is, therefore, clearly within the statute.

So construed, the Act is constitutional. The tax is an excise imposed not upon the transfer of the statutory gross estate but upon the transfer of the decedent's interest in such property as she actually owned at her death. The statute expressly so provides, for it imposes the tax upon the *transfer* of the *net estate of the decedent*, and this Court has held that the tax is imposed upon the cessation of the decedent's interest in property. Moreover, the occasion of all death duties is the transmission of a decedent's property and so far as transfers not occasioned by death are taxed by the States the imposition is attributable to the power to regulate rather than to the taxing power. The structure of the Federal Act shows that certain property which is included in the gross estate is not the occasion of the tax either directly or by reason of its transmission, for some unidentified part of the property included in the gross estate is excluded from the estate which gives rise to the tax.

The value of the gross estate is merely the measure of the tax and does not affect the constitutionality of the Act unless the measure is wholly arbitrary and unreasonable.

The measure adopted by Congress is a reasonable measure and has been so held by numerous courts on the theory that transactions such as that involved in this case are testamentary in effect, although not in form, and are, therefore, reasonably related to the occasion of the tax; that is, to the transmission of property by death. The power of Congress to impose an excise tax upon a past occasion or to measure an excise tax by a past occasion is unquestionable.

The tax imposed by Title IV of the Revenue Act of 1918 is an excise and not a direct tax. This Court has substantially so held. The tax is not imposed by reason of the general ownership of property or upon property. It is, therefore, not direct under the rule laid down by this Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429. The provisions for the collection of the tax, although they impose a burden upon property, do not make the tax a direct tax.

ARGUMENT

I

THE TRUST CREATED BY THE DECEDENT IS WITHIN SECTION 402 (C) OF THE ACT WHEN THAT SECTION IS PROPERLY CONSTRUED

The court below held that the trust which the decedent created in 1907 was one intended to take effect in possession or enjoyment at or after her death, in spite of the fact that in April, 1917, she assigned all her interest in the trust property to the same five children who were (unless they or some of them died before the time of distribution) to enjoy and possess the corpus after her death. In so ruling the court followed the very words of the statute which provides that the property to be included is any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, intended to take effect in possession or enjoyment, at or after death.

The opposing view of the statute is that it was not intended to include any property with respect to which the decedent, in his life time, had parted with all interest.

Although Mrs. Coolidge transferred all her interest in the property involved in the trust, she adopted a vehicle by which the possession or enjoyment of the remainder interest (and that remainder interest is what the Commission included in the gross estate) was postponed until she died.

Until then the corpus was in the hands of others than those ultimately entitled to have it. The possession or enjoyment of the corpus was postponed since "possession or enjoyment" means the right to use, enjoy, and possess the property with all the legal as well as equitable attributes of ownership. The possession or enjoyment to which the statute refers is not a technical vesting but actual enjoyment. A life estate is one interest, a remainder is another interest, and the statute reaches "*any* interest," the possession or enjoyment of which is postponed until at or after death. (Sec. 402 (c).)

In dealing with this same phrase as used in the Federal Inheritance Tax Law of 1898 (Sec. 29, Act June 13, 1898, Ch. 448, 30 Stat. 448, 464, this Court said in the case of *Vanderbilt* v. *Eidman*, 196 U. S. 480, at page 491:

> It will be observed that the duties imposed in section 29 (of the Federal Inheritance Tax Law of 1898) have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense

> of title to the gift, but upon the actual possession or enjoyment thereof. * * *

There is nothing unusual about the language used in the statute. It is the language commonly used to describe future estates. Its meaning is clear. "Estates in possession or enjoyment" are those which give their owner the right to use, enjoy, and have the *res* immediately. Those which are not in possession or enjoyment are in expectancy; that is, the owner is to have the possession or enjoyment of the *res* at some future time. The presumption is that Congress used ordinary language in its ordinary significance, and, therefore, that it intended in this section to include all property which a decedent in his lifetime transferred either to donees directly or to donees indirectly through a trustee, by such an instrument that the donees' immediate possession or enjoyment of the property so transferred was postponed until the donor's death.

In the case at bar the children, even after the assignment, lacked during their mother's lifetime in at least two important particulars such possession or enjoyment. They could not dispose of the trust property and they could not use it. They had the income but not the use or disposal. No one would for an instant contend that the right to farm a property, which is its use, is the same thing as the right to receive the income produced from the land when farmed by another. In one case the property

is in possession and enjoyment. In the other only the income is in possession or enjoyment. In the instant case the founder intended (and the intention is the test established by the statute) that the possession and enjoyment of the corpus of the trust fund should be postponed until after her death. The trust was created for the very purpose of preventing the beneficiaries from having control of the corpus until that time. It is only when the beneficiaries have the use and disposal of the property without reference to the time of the donor's death that the gift is not within the statutory language.

Re Waugh, 78 Pa. 436.

Re Morris, 1 Pa. Dist. Rep. 818.

In re Einstein, 114 Misc. 452, 186 N. Y. S. 931.

State Street Trust Company v. *Treas. & Rec'r Gen'l*, 209 Mass. 373.

In re Bottomley's Estate, 92 N. J. Eq. 202.

In re Fulham's Estate, 96 Vt. 308.

In re Egerton's Estate, 103 Misc. 471, 170, N. Y. S. 222.

The courts have generally construed the Federal statute in the same way.

Safe Deposit & Trust Co. v. *Tait*, 295 Fed. 429.

Mercantile Trust Co. v. *Hellmich* (not reported), T. D. 3545; 26 Treasury Decisions, Internal Revenue, 9.

Shukert v. *Allen*, 300 Fed. 754; aff'd 6 F. (2d) 551; cer. granted Oct. 19, 1925.

Stark, Ex'r. Schmidlapp v. *United States*, 14 F. (2d) 616.

McCaughn v. *Girard Trust Co.*, 11 F. (2d) 520.

Indeed this is the settled construction of the phrase "intended to take effect in possession or enjoyment at or after death." That phrase has long been used in inheritance tax statutes. It was used in the Federal Acts which preceded the Revenue Act of 1918. (See Revenue Act 1916, Act Sept. 8, 1916, Ch. 463, 39 Stat. 756, 777; Legacy Tax Act 1898, Sec. 29, Act June 13, 1898, ch. 448, 30 Stat. 448, 464; Revenue Act of 1862, Act of July 1, 1862, Ch. 119, 12 Stat. 433, 485.)

It has been used in State Inheritance and Estate Tax Acts for a hundred years. It has always been construed as including trusts such as the Coolidge trust, whether used in Acts imposing taxes on the right to receive (as in Massachusetts, see *Dana* v. *Dana*, 226 Mass. 297, 418), or in Acts imposing taxes on the right to transmit (as in New York, see *Keith* v. *Johnson*, 271 U. S. 1.)

Thus in the case of *Reish* v. *Com.*, 106 Pa. St. 521 (decided in Pennsylvania where the phrase originated in 1826). John Reish died on the 15th day of August, 1878. On the 10th day of August, 1878, he made a deed conveying all his property, real and personal, to his brother Isaac absolutely and unconditionally. At the same time Isaac executed a bond conditioned upon the payment to his brother during life of the income from the property

conveyed to him. The Act then in force provided in part that any real or personal property—

> transferred by deed, grant, bargain or sale, made, or intended to take effect, in possession or enjoyment, after the death of the grantor or bargainor, to any person or persons, etc., other than to or for the use of father, etc., shall be and they are hereby made subject to a tax or duty, etc.

The court said (p. 525):

> What was the effect of the writings made August 10th, 1878, so far as the charge for collateral inheritance tax is concerned? The deed and the bond were contemporaneous, the execution and delivery of both constituted a single transaction; the deed was absolute, it contained no condition, it was without reservation; but the bond, although in the form of a mere personal obligation, was in effect, we think, as regards the collateral inheritance tax, a postponement of the time of enjoyment, a reservation of the income and profits of the property, during the lifetime of the grantor.

Again in *State Street Trust Company* v. *Treas. & Rec'r Gen'l*, 209 Mass. 373 (a case involving a trust created, as is the one involved in the instant case, under the laws of Massachusetts), a donor created a trust to pay the income of the trust fund to named beneficiaries during the donor's life and at her death to pay the principal to those beneficiaries, or if she should be dead, to their appointees.

The court held that this trust was one intended to take effect in possession or enjoyment at the donor's death, saying (p. 378):

> If the income was payable to them [the beneficiaries], the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life, and the defendants [the beneficiaries] have failed to bring themselves within this exception.

Again in *Matter of Dunlap*, 205 App. Div. 128, 199 N. Y. S. 147 (a New York case construing the New York law, which, like the Federal Law, imposes a tax on the right to transmit), it is held that a trust which provides that entire income should be paid to the grantor's four children in equal parts and the share of any beneficiary dying during the lifetime of the grantor should be paid to her issue, if any, surviving, and that on the death of the grantor the property should be distributed to the daughters in equal shares, was within the Statute. The possibility of reverter in the Dunlap case is also present in the instant case, for it might well be that all the Coolidge children would die without leaving issue and without leaving a surviving spouse before the death of the grantor. (Ch. 190, Sec. 3 (4), Gen. Laws of Mass. 1921.)

As further examples of transfers held to be postponed, although the donor reserved no interest in the property, see:

Re Jones Estate, 65 Misc. 121, 120 N. Y. S. 862.)

Re Patterson, 146 App. Div. 286 (N. Y.) 130 N. Y. S. 970.

New England Trust Co. v. *Abbott*, 205 Mass. 279.

People v. *Danks*, 289 Ill. 542.

In re Cruger, 54 App. Div. 405, aff'd. 166 N. Y. 602 (as to part of the income).

In re Bottomley's Estate, 92 N. J. Eq. 202.

In re Keeney, 194 N. Y. 281, aff'd. 222 U. S. 525 (as to three-fourths of the income).

In re Todd's Estate, 237 Pa. 466.

With this long-continued and harmonious judicial construction of the phrase before it, Congress used that phrase without qualification or change. It manifestly intended the phrase to have the meaning and effect given to it by those prior judicial decisions; otherwise it would have used other language.

The construction which the court below placed upon this phrase finds its justification not only in the letter of the statute and previous judicial utterances but also in the spirit of the Act and the purpose which Congress in using this well-defined phrase sought to accomplish. Its purpose was not to prevent evasions of the tax, for it applied it to transactions which were completed when there was no tax to be evaded. Nor was its purpose to tax transfers in trust on the theory that this class of gifts involved the transfer of some interest from

the dead to the living, for this phrase occurs in conjunction with other classes of property in some of which all the decedent's interest had ceased prior to death, i. e., gifts made in contemplation of death although two years prior thereto, and in some of which the decedent never had any interest, i. e., property passing under a general power of appointment exercised in prescribed modes by the decedent, and insurance money paid to beneficiaries other than the estate because of the decedent's death. Certainly these classes of property were not included in the gross estate for the purpose of taxing the transfer of decedent's property or interests in property. At his death he had no interest and there was no transfer.

In all the above cases Congress was seeking not the occasion for a tax but the measure for a tax. It was seeking, moreover, a measure which would be equitable and, in a practical sense, would result in an equal tax; that is, one equal not only with reference to what was given but also with reference to what was received. The measure adopted looks at the substance rather than the form and includes not only those transfers which are the technical result of testacy or intestacy but also those transfers which have practically the same effect as those made by will; that is, those transactions which are testamentary in character because they confer no practical benefit upon the beneficiary until the donor dies.

That the trust involved in this case is, in that sense, testamentary in character, and thus within the purpose and spirit of the statute there can be no doubt. (*Keeney* v. *New York*, 222 U. S. 525.)

II

THE REAL ESTATE WHICH THE DECEDENT CONVEYED IS WITHIN SECTION (c) OF THE REVENUE ACT OF 1918, BECAUSE SHE RETAINED A LIFE INTEREST IN THE PROPERTY AND THE GRANTEES WERE NOT INTENDED TO HAVE EITHER POSSESSION OR ENJOYMENT DURING HER LIFETIME

The deeds which the decedent executed in 1917 conveying certain real estate to her children are absolute on their face, and the leases which were executed as part and parcel of the same transaction are, on their face, determinable at will by the lessors. Nevertheless, the transaction contemplated, and the parties so understood, that the deeds were not to operate absolutely and that the leases were not to be terminable, but, on the other hand, that the grantors should have, use, and enjoy the premises for their lives. (R. 16, par. 14.) The transaction amounted to the reservation by the grantors of a life estate in the premises.

The court below held that the transaction was not within the statute as he construed it. The fallacy of this view, it is submitted, is found in his statement at the bottom of p. 22 of the record, in which he proceeds on the theory that the lease, giving the lessors the right to cancel it at the end of

any year, was the only operative, valid arrangement. The stipulation of facts states that it was the understanding of the parties that the parents should retain the use and possession of the property so long as they, or either of them, lived. The terms of the written lease provided that the children could cancel the lease at the end of any year.

The court proceeded on the theory that the written provision in the lease was the only enforceable arrangement. In this he was manifestly in error. He overlooked entirely the doctrine of reformation of contracts. On the record as it stands, it is almost too plain for argument that the written lease in its cancellation provisions did not express the true agreement of the parties; that the true agreement was that the right of cancellation by the children was qualified by the understanding that the right should not be exercised so long as the parents might desire to use these dwellings for residential purposes, and if the children had attempted to cancel the lease under its terms while the parents desired to reside in the property, it being admitted, as the stipulation shows, that both parties to the lease had understood and agreed when it was made that the parents might enjoy the property during their lives for residential purposes, the parents could have resisted cancellation by asking the reformation of the lease to accord with the undisputed agreement.

The whole transaction shows on its face that the parents never intended to give their children the

right to throw them out of their home during their lifetimes, and the statute makes intention the controlling feature, namely, transfers and trusts "*intended* to take effect in possession or enjoyment at or after death." (Sec. 402 (c). See *Orvis' Estate*, 223 N. Y. 1.)

And in other similar cases the courts have had no difficulty in looking through the form of the transaction and including it for tax purposes if its true meaning and effect are to permit the grantor to use and enjoy the property for life.

As stated in the case of *People v. Shaffer*, 291 Ill. 142, 147:

> There can be no question, under the authorities, that if the actual intention of the parties to the deeds was that the possession and enjoyment of the land so conveyed thereby were to be postponed until grantor's death, the transfer of such lands is subject to the inheritance tax notwithstanding such evidence is not in writing, but can only be shown by parol. (Citing authorities.)

Matter of Jones, 65 Misc. Reports (N. Y.), 121, at page 123:

> * * * The deeds are absolute upon their face as to the title and immediate right of possession and enjoyment, and it is contended by the appellant that the intent as to the possession and beneficial enjoyment must be ascertained solely from the language of the deeds, and that the surrounding cir-

cumstances and intrinsic facts are immaterial.

I do not believe that the courts of our state have adopted such a rule for cases like this.

To the same effect see:

People v. *Porter*, 287 Ill. 401.
People v. *Moir*, 207 Ill. 180.
People v. *Burkhalter*, 247 Ill. 600.
Re Masury, 28 App. Div. 580, aff'd 159 N. Y. 532.
Matter of Ball, 161 App. Div. 79 (N. Y.).

The agreement, as distinguished from the apparent agreement, was that the grantors should have possession and enjoyment until death and that the grantees should not. The transfer is unquestionably within the statute. (*McCaughn* v. *Girard Trust Company*, 11 F. (2d) 520.)

III

THE REVENUE ACT OF 1918 SO CONSTRUED IS CONSTITUTIONAL.

1. *The tax is an excise imposed not upon the transfer of the statutory gross estate but upon the transfer of the decedent's interest in such property as he actually owned at the time of his death.*

This Court has said that the Federal Estate Tax is a tax imposed upon the transfer of a decedent's net estate; that the occasion of the tax is the cessation of his interest in property. The nature of the

tax as stated by this Court in *Young Men's Christian Association of Columbus, Ohio,* v. *Davis,* 264 U. S. 47, is as follows (p. 50):

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore,* 178 U. S. 41, 48, 49.

Neither the plaintiff in error nor the defendant in error attacks this description of the Federal Estate Tax, but starting from this fundamental conception of the tax the argument of the defendant in error departs from that of the Government in its conception not only of the "transfer" which is taxed but also of the property which composes the "net estate." The defendant in error bases his argument upon the conception that the transfer which is taxed is any transfer within the description of Section 402 of the Act, and that the net estate which is transferred is composed of the property described in Section 402, less the deductions described in Section 403. The Government, on the other hand, considers that, since the tax is upon the cessation of the decedent's interest in property and is occasioned by death, the transfer which occasions the tax is necessarily that transfer which takes

place at death, and that the "net estate," the transfer of which is taxed, is necessarily the decedent's property at the time of death. The "net estate" refers not to the property described in Section 402 of the statute but to the net estate as commonly understood—to the property and interests in property which the decedent actually owned at the time of his death above his liabilities.

Congress has no power to regulate the transfer of or succession to property, and therefore can not, as pointed out in *Knowlton* v. *Moore*, 178 U. S. 41, impose a tax upon the privilege of transferring property. The Federal imposition is an exercise of the Federal taxing power and is imposed upon a transmission of property by death. In construing the provision of the Federal Estate Tax Act it must be presumed that Congress intended to impose the tax upon a subject matter within its authority, and that, therefore, it intended to impose the Federal Estate Tax upon a transmission of property by death. It must likewise be presumed that since Section 402 describes transfers which are not occasioned by death and property which is not transmitted by death, that the purpose of Congress in putting this section into the Act was to provide a measure for the tax.

2. *Section 402 of the Act merely provides the measure of the tax, and the measure so provided is a reasonable measure.*

The transactions which afford the measure of the tax are specified in Section 402. The *value* of

the gross estate is to be *determined* by a statutory rule of values which may or may not conform to the facts. (See *Harder* v. *Irwin*, 285 Fed. 402.) The value of the gross estate thus determined and the resulting value of the net estate by which the amount of the tax is determined depend upon the statutory rule. The statute does not specify any particular property as being that constituting the net estate and does not indicate that any particular part of the property used in determining the value of the gross estate shall constitute or be included in the net estate. On the contrary, it clearly and by the terms used expressly negatives such an intention, for in determining the value of the net estate certain *amounts* are to be deducted under Section 403 from the value of the gross estate. For instance, the statute allows a deduction of "$50,000." Must a decedent have at the time of his death 50,000 actual dollars in order that this deduction may be taken? If not, then suppose a man makes a transfer of property worth when he dies $50,000 and this transfer is in contemplation of death, and having made such transfer he dies owning property worth $50,000. In such case the deduction does not take the property transferred in contemplation of death out of the estate. Again, since the statute provides for the deduction of the amount of the debts, etc., and not for the deduction of the property used to pay such charges, this deduction does not take any part of the transferred property out of the estate.

This construction is fortified by the fact that Congress did not use the time-honored form of expression which is, and has been, used repeatedly in statutes which do fix as the taxable occasion a transfer which does not take place at death but is nevertheless of a testamentary character. In substance such statutes provide that property which shall pass or vest by dower, courtesy, will, or by Statute of inheritance of this or any other State, or by deed * * * made in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment after the death of the grantor * * * in trust or otherwise shall be taxed. The Federal statute, on the other hand, does not particularize the transfers which are taxed, but taxes generally and as a whole all transfers which are occasioned by the cessation of a decedent's interests in property at and by his death.

In framing Section 402 Congress has looked to the form and manner of the transfer and to the status arising at death as a result of either the ownership of property or its previous transfer. If on the whole the transaction has so resulted that it amounts substantially to a testamentary transfer, the value of the property affected is included in the measure of the tax. For the measure of a tax not only must result generally in equality of taxation, but also it must prevent generally an evasion of taxes. Congress in fixing the measure of this tax

has sought no less to have the same tax from estates in the same practical, though different technical, position than to prevent evasions. On this theory and for this purpose the provisions relating to the measure of the tax have been made to include transactions not in themselves taxable transactions. Congress has included in the measure certain classes of property with the transfer of which actual death has no connection and has excluded from the measure of the tax certain classes of property, the transfer of which is clearly taxable, e. g., $50,000 exemption; gifts to charity, moneys which pass to creditors, and property lost by casualty after death. It is thus quite apparent that the aim of Congress has been to include in the measure of the tax all that is necessary to make it operate with equality, having reference not solely to the property which a man keeps until he dies and then passes to his heirs, but as well to that property which he has disposed of in his lifetime in such a manner that his heirs benefit thereby when he dies.

If the measure bears a reasonable relation to the subject matter of the tax it is valid and can not be attacked under the Fifth Amendment.

License Tax Cases, 5 Wall. 462, 471.

United States v. *Singer*, 15 Wall. 111, 121.

Knowlton v. *Moore*, 178 U. S. 41, 57, 58.

Patton v. *Brady*, 184 U. S. 608, 619, 620, 622.

McCray v. *United States*, 195 U. S. 27, 59, 60, 63.

Flint v. *Stone Tracy Company*, 220 U. S. 107, 158.

Billings v. *United States*, 232 U. S. 261, 281, 282.

Brushaber v. *Union Pac. R. R. Co.*, 240 U. S. 1, 20, 24.

United States v. *Doremus*, 249 U. S. 86, 93.

The discretion which Congress exercises in fixing the measure of an excise is of wide latitude. The measure must be "wholly arbitrary and baseless" to be void. It must "inevitably" lead to the conclusion that the tax is not a tax at all but an attempt to confiscate property. It must be such a measure as can not in any view be sustained by reason. It is not enough that viewed from one aspect it is unreasonable. It must be so from every aspect. It must be *wholly* unreasonable.

So far eight courts have held the measure reasonable. (See *Safe Deposit & Trust Company* v. *Tait*, 295 Fed. 429; *Mercantile Trust Company* v. *Hellmich*, D. C. Eastern Mo. T. D. 3545, Vol. 26, Treasury Decisions, Internal Revenue, 9; *Cleveland Trust Company* v. *Routzahn*, 7 F. (2d) 483; *Reed* v. *Howbert*, 8 F. (2d) 641; *Congdon* v. *Lynch*, D. C. Minn., unreported, T. D. 3324, Vol. 24, Treasury Decisions, Internal Revenue, 735; *Shwab* v. *Doyle*, 269 Fed. 321; *Frew* v. *Bowers*, 9 F. (2d) 644 (Rev. C. C. A. 2d, 12 F. (2d) 625, petition for certiorari filed); *Stark, Exr. of Schmidlapp* v. *United States*, 14 F. (2d) 616.)

3. ***The measure is reasonable because the transactions which are included are testamentary in character.***

The measure adopted by Congress is not an arbitrary measure. There is a reasonably close relation between the occasion of the tax and its measure. Doubtless, considering the nature of the tax, it would be logical, since the tax is rested upon the cessation of the decedent's interests in property, to measure it by the value of the interest which ceased. This would, however, be a rule of difficult administration, depending in many instances upon the true construction of instruments, upon various contingencies affecting the decedent's ownership, and upon State laws. On the other hand, Congress would have the force of ancient precedent behind it if it had exacted a flat sum in every case, for this was the theory on which death duties were imposed in feudal times by means of "reliefs" and "*primer seizins.*" (Dos Passos, Inheritance Tax Law, 2d Ed., page 8.) The manifest inequality and hardship inherent in such a measure doubtless forbade its adoption.

Between these two extremes is a middle ground, which involves no practical difficulty of administration and which considers not only the rights of the decedent but also the rights of the heir, and provides not only for the prevention of evasions but also for the maintenance of equality between the man who substantially has made testamentary

disposition of his property before he dies and the man who actually makes a testamentary disposition of his property at the time he dies.

If it is argued that hardship may occasionally result from the measure adopted it may be answered by paraphrasing the language of Mr. Justice Holmes in *Lewellyn* v. *Frick*, 268 U. S. 238, that to impose a death duty which is *not* measured by past testamentary transfers is to impose an unexpected liability that, if known, might have induced those concerned to avoid it by making testamentary gifts of their property before the Act was passed. Moreover, the supposed hardship does not lead one to believe that a man who accomplishes a result by one means should be preferred as to taxation on that result over another who accomplishes the same result by other means. It is, therefore, no more than fair to increase the rate of tax upon the transfer of any estate which has been depleted of its property by quasi-testamentary transfers made prior to death.

A transfer *inter vivos* which deprives the donee of the use and enjoyment of the property given until the donor's death has great similarity to a testamentary gift. The distinctive feature of a testamentary disposition is this, it gratuitously confers a benefit which is enjoyable only at the death of the testator, until which time it is revocable. Assuming an irrevocable gift, is the fact that no practical benefit is conferred until death sufficient to associate such a gift with a transmission of prop-

erty by death for the purpose of affording a reasonable measure of a death duty?

The answer to this question is found in *Keeney* v. *New York*, 222 U. S. 525, where it is said (p. 535):

> Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey* v. *Rew*, *supra*, be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power during his own lifetime, the remainder does not fall in at his death, and such conveyances would not be so often resorted to as a means of evading the inheritance tax. 194 N. Y. 287. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiary, at and after his death.

And in *Crocker* v. *Shaw*, 174 Mass. 266, it is said (p. 267):

> We see no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. In either case it is the privilege of disposing of property after the death of the grantor or testator and of succeeding to it which is taxed, though the amount of the tax is determined by the value of the property.

In so far as the testamentary character of such a limitation is concerned, it makes no difference

whether the intervening life estate be reserved to the grantor or conveyed to another, since possession or enjoyment of the remainder is not had until the grantor's death (*State Street Trust Company* v. *Treas. & Rec'r Gen'l*, 209 Mass. 373), and it is the value of the remainder which is included in the gross estate.

The testamentary character of gifts which come into possession and enjoyment at or after death is further illustrated by those cases which hold that this change in possession is in itself a proper occasion for the imposition of a death duty. For example, the Finance Act, 1894, of England, Part 1, Section I, includes such transfers, and, commenting on it, Hanson says:

> The first condition essential in order that estate duty may be payable (under s. 1) on a death in respect of any property (as distinguished from any particular estate or interest in property) is the continuous existence of the property before and after the death. * * * The second condition is that the property must change hands at the death. The principle of the Finance Act, 1894, is that whenever property changes hands on death, the State is entitled to step in and take toll of the property as it passes. * * * (Hanson, Death Duties, 6th Ed. p. 80.)

To the same effect see *Wright* v. *Blakeslee*, 101 U. S. 174, and *Scholey* v. *Rew*, 23 Wall. 331.

It must be apparent that if a transaction of a certain kind is "testamentary in character" when

it takes place after a given date, it is also testamentary in character if it occur before that date unless the time of its happening fixes its character. The time when a transfer of the kind in question is made has nothing to do with its nature or effect. It is always a gratuity conferred by one upon another under such circumstances, conditions, or restrictions that the recipient does not receive the property until the donor dies. The donee may get an estate in the property before death and in this he is unlike a legatee. But he gets the property itself because of death, and in this he is like a legatee. As has been shown, this likeness has been held sufficient to classify such transfers as testamentary. If this likeness is sufficient to counterbalance the unlikeness in the event of a gift made after the Act, it, of course, is likewise sufficient in the event of a gift made before the Act. If it is fair and reasonable for Congress to increase the rate of tax when a gift has been made after the Act, it must be the same when the gift is made before the Act so long as the reason for the increase is that the result of the transfer is the same as a transfer by death. The theory of Congress is that a person who does not deplete his estate before death by testamentary gift must pay a tax on the transfer of the whole of his property, and that a person who makes such testamentary gifts in his lifetime must pay the same tax on his depleted estate, so that these two men who have in effect done the same thing shall be taxed alike.

When a transfer of the nature here considered is made, whether before or after the passage of the Act, the maker does not "voluntarily" subject himself to "the burden of the tax." (Charge below, Record, page 27.) The occasion of the tax is the transmission of the decedent's property at death. He "voluntarily subjected himself to" the tax when he dies the owner of property. The "privilege" of creating the trust or of otherwise making a testamentary disposition of his property in his lifetime is not the occasion of the Federal tax, whatever may be said on that subject as to taxes imposed by the several States. (*Knowlton* v. *Moore*, 178 U. S. 41.) It can make no difference in principle whether such privilege is exercised before or after the Act. Such transfers are not included because the decedent has exercised a privilege.

Whether it be said that death or the conveyance is the "generating source" (Charge below, Record, page 26) of the donee's possession or enjoyment (and it is clear that neither alone is such source), it is certain that until the donor dies the donee does not have possession or enjoyment, and in that respect is in a like situation with a legatee. Likewise, it is certain that so far as the donor is concerned he has accomplished his object of withholding from his beneficiary the benefit of the gift until after death. The succession is not complete until possession and enjoyment begin. (*Clapp* v.

Mason, 94 U. S. 589; *Mason* v. *Sargent*, 104 U. S. 689.)

The adoption of such a measure does not involve the levying of a tax upon the transfer of A's estate measured by the value of B's property. (Charge below, Record, page 26.) Congress has measured a tax on the transfer of property occasioned by and, therefore, effective at death by including transfers which are effective at death but not occasioned by it, so that the amount of the tax shall be the same whether the testamentary transfer was made before death or at death. The inclusion of this class of transfers does not increase the amount of tax over that which would have been due if the decedent had not taken advantage of the opportunity afforded him of making a testamentary gift before he died.

The contention that the measure is unreasonable amounts to this: It is unreasonable not to permit a man who has exercised the privilege of making a testamentary transfer in his lifetime to pay a less tax than is paid by one who has not exercised such privilege, and this although both men have practically, though not technically, done the same thing. The complete answer to this objection seems to be that taxes are properly, and indeed must be, imposed and measured by reason of the practical likeness of occasions or privileges regardless of legal and technical distinctions. (See *Southern Railroad Company* v. *Greene*, 216 U. S. 400, as explained and

commented on in *Flint* v. *Stone Tracy Company*, 220 U. S. 107. Also, *Nicol* v. *Ames*, 173 U. S. 509.)

4. *Apart from the question of construction, it makes no difference whether the taxable transfer is considered to be the grant intended to take effect in possession or enjoyment at or after death or to be the transfer of the decedent's own property by reason of death since a retroactive excise is constitutional.*

This distinction between the occasion of the tax and the measure of the tax is not necessary to sustain the validity of the tax. Congress has not attempted to do indirectly that which it could not do directly and to cover its lack of power by a name. There is no question of power involved. Congress can impose an excise upon a past transaction or it can measure the excise by such transaction. This is abundantly settled by the following cases:

In *Hylton* v. *United States*, 3 Dall. 171, a tax on carriages for the conveyance of persons for private use was upheld as a valid excise, although it was measured by carriages so kept on the fifth day of June, 1794, the day on which the law became effective.

In *Flint* v. *Stone Tracy Company*, 220 U. S. 107, a tax on the privilege of doing business in a corporate capacity was sustained, although the measure of the tax was in part income earned before the passage of the Act.

In *Washington Water Power Company* v. *United States*, 56 Ct. Cls. 76, the capital stock tax

imposed by Section 407 of the Revenue Act of 1916 with respect to carrying on or doing business by corporations measured by the fair average value of corporate stock for the preceding year was held valid.

In *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501, the munitions manufacturers' tax imposed by Section 301 of the Revenue Act of 1916 was held valid as an excise, although it applied to munitions manufactured and sold on contracts made in 1915.

In *Patton* v. *Brady*, 184 U. S. 608, an excise was imposed upon the manufacture and sale of certain articles, to wit, tobacco, and was measured by one-half the difference between the tax already paid (prior to the Act) and the tax imposed by the Act on a similar article.

In *Railroad Company* v. *Collector*, 100 U. S. 595, an excise tax upon the business of corporations was measured in part by interest on funded debt—an obligation assumed before the passage of the Act.

The last expression of this Court is found in the case of *Hecht* v. *Malley*, 265 U. S. 144, in which it is held that the Revenue Act of 1918 imposing an excise tax upon the privilege of doing business measured by the fair average value of the capital stock is constitutional, although it imposes a tax on the doing of business prior to the passage of the Act.

Mr. Justice Sanford, in writing the opinion of the Court, said (p. 164):

> In view of the retroactive provision of the Act of 1918, we are of the opinion that taxes for the year ending June 30, 1919, can not now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States.

In *Stockdale* v. *The Insurance Companies*, 20 Wall. 323, it was held that the Income Tax Law of 1864 was an excise and was constitutional, although the measure of the tax was all the income of the previous year. It is interesting to note that in this case, as also in the *Patton case, supra*, the measure of the tax had been previously used to measure another excise tax.

The excess profits tax of October 3, 1917, is "essentially an excise tax," *Porter* v. *Lederer*, 267 Fed. 739, 740, and is constitutional, although measured by income earned prior to the passage of the Act. See also *Boss & Peake Automobile Co.* v. *United States*, 290 Fed. 167; *United States* v. *Updike*, 1 F. (2d) 550, affirmed 8 F. (2d), 913, certiorari denied April 19, 1926; *United States* v. *McHatton*, 266 Fed. 602.

In the case of *Penna. Company, etc.*, v. *Lederer*, 292 Fed. 629, it is held proper to measure an estate tax under the Revenue Act of 1918 by the value of property passing under a general power of appointment created before but executed after the passage of the Act.

In *Congdon* v. *Lynch* (D. C. Minn., unreported to date, T. D. 3324, Volume 24, Treasury Decisions, Internal Revenue, page 735), it was held that there was no constitutional objection to construing the provisions of the Revenue Act of 1916 so as to include a trust intended to take effect in possession or enjoyment at or after death, although the trust was created prior to the passage of the Act.

In *Shwab* v. *Doyle*, 269 Fed. 321, it is held that the Federal Estate Tax levied by the Act of 1916 was constitutional, although relating to transfers made prior to its passage. This case was reversed on another ground in 258 U. S. 529.

Perhaps the leading case on this subject is that of *Billings* v. *United States*, 232 U. S. 261. That case involved the construction of Section 37 of the Tariff Act of August 5, 1909 (Ch. 6, 36 Stat. 11, 112) laying a tax on the use of foreign-built yachts. The Act went into effect on August 6, 1909, and provided that the tax should be collected annually on the first day of September. It was insisted that it could not apply to the twelve months preceding the first day of September, 1909, as it would act retroactively for nearly an entire year. However, the Court held that Congress possessed the power to impose such retroactive tax and that the statute should be so construed to impose it. The fact that the privilege for using the yacht for the period preceding the passage of the Act had already been exercised was not supposed to have changed the tax

for that period into a direct tax nor to have made the measure unconstitutional.

In view of these authorities it is submitted that, in the words of this Court in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331:

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted * * *.

5. *The tax imposed by the Revenue Act of 1918, Title IV, is not a direct tax, although transfers made prior to its passage are involved, but is an excise.*

The importance of the distinction between imposing a tax upon a past occasion and measuring a tax by such occasion arises because under such a construction the controlling features of the Revenue Act of 1918 are the same as those of the 1916 Act. Under both statutes a tax was imposed upon any transmission of property at death after the passage of the Act measured by the value of property not owned or transferred by the decedent at the time of his death. The measure of the tax in both cases, when considered as of the time the tax attached (the date of death) included the value at the date of death of property previously transferred and vested in others than the decedent. Both involved the same hardship upon the residuary legatees or distributees of those estates which, for one reason or another, have after the transfer been denuded of much of the prop-

erty which the donor, at the time he made the transfer, expected and hoped such legatees or distributees would receive. Both involved the same possibility of hardship incident to measuring the tax by the value at the date of death rather than the value at the date of the transfer. Both involved a reference to "one man's property to determine the amount of another man's tax." In both cases the tax was "unavoidable."

These objections to the 1916 Act did not seem controlling to this Court in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345. Mr. Justice Holmes said (at page 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpreation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy."

The measure of the tax under the statute construed in the *Eisner case* did not include transactions completed prior to the passage of the Act. But the tax is no more or less inevitable when it is

measured by past transactions than it is when measured by subsequent transactions. In both cases the tax is inevitable because its generating source is death. It is true of all death duties, however measured, that they are unavoidable. The owner of property may destroy it and thus escape the tax, but such chimerical possibility is hardly such an election as would influence a court in determining whether such a tax is direct or indirect. However this may be, it is certain that the decedent in this case had exactly the same opportunity of avoiding the tax as did the decedent in the *Eisner case, supra*. She did not avoid it; she died the owner of property which was transmitted by her death. Upon this transmission a tax was imposed by a Federal statute. That tax is measured by the value of certain property which the decedent did not own at her death or after the Act was passed. Consequently the decedent could not avoid or change the measure. However, such inability would not seem to determine either the nature of the tax or its validity. (*Bass, Ratcliffe & Gretton* v. *State Tax Com'n.*, 266 U. S. 271, 284.)

Moreover, a tax which is unavoidable is not necessarily a direct tax. The cases of *Thomas* v. *United States*, 192 U. S. 363; *Flint* v. *Stone Tracy Company*, 220 U. S. 107; and *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, 558, are not to the contrary. These cases hold that a tax which is avoidable is not a direct tax. The converse is not

necessarily true, for a tax which is unavoidable may be either a direct tax or an indirect tax. It is a direct tax if the occasion which gives rise to it is the ownership of property. It is indirect if the occasion which gives rise to it is the happening of an event. These principles were established in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429; 158 U. S. 601; as explained in *Knowlton* v. *Moore*, 178 U. S. 41, and *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1, 20.

In the *Pollock case, supra*, it is determined that direct taxes are capitation taxes and taxes upon real estate (and personalty) *eo nomine*, or upon its owners in respect thereof, and that there is no "distinction between the real estate itself or its owners in respect of it and the rents or income coming to the owners as the natural and ordinary incidents of their ownership." (157 U. S. 580.) A "death duty," therefore, is not a direct tax, although it is unavoidable, for there is no right to transfer (or receive) property by reason of a death attached to the ownership of property as one of its "natural and ordinary incidents." And this is true whether the transfer (or receipt) be accomplished by virtue of a will, the intestate law, the laws of descent, or the creation of a technical future estate by deed *inter vivos*.

Keeney v. *New York*, 222 U S. 525.

Cole v. *Nickel*, 43 Nev. 12, affirmed 256 U. S. 222.

The tax does not become a direct tax on property because it is a charge against and payable out of property. All taxes are necessarily so paid, and provisions looking to the enforcement of the tax do not determine its character. As the Court said in *Scholey* v. *Rew*, 23 Wall. 331, 347:

> * * * nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

There is nothing to indicate that Congress intended to impose or, in fact, imposed one kind of a tax when paid by the executor and another kind when paid otherwise. The sections relating to payment and collection do not concern or modify the section imposing the tax. They are merely details for the effectual and practical operation of the law.

> *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 173.
>
> *In re Inman's Estate*, 101 Oregon, 182.

The provisions relating to the collection and payment of the tax relate to property gratuitously transferred and to donees. Manifestly, Congress has a right to prevent any person from disposing of any property gratuitously unless provision is made for taxes. In fact, Congress has in the past done more than this. It has made claims for taxes prior to the claims of *bona fide* purchasers and mortgagees who took without notice.

Revised Statutes, Section 3186, before amendment.

Osterberg v. *Union Trust Company*, 93 U. S. 424.

Blacklock v. *United States*, 208 U. S. 75.

United States v. *Curry*, 201 Fed. 371.

Clearly such a provision is no more than a "detail deemed proper for the effectual operation of the law." When it is considered that these provisions relate to gratuitous takers and not to purchasers it would seem not only reasonable but highly proper to protect the Government's interest at the expense of the beneficiaries, for they are not thereby deprived of their earnings.

It is submitted that Congress, no less than the States, can avoid voluntary conveyances which operate to deprive the Government of its power to collect its taxes, if, indeed, such conveyances can not be avoided in the absence of any statute upon well-settled principles of law. For instance, a stockholder who receives a liquidating dividend from a corporation prior to the passage of a Taxing Act is liable to the extent of assets so received to pay a tax subsequently imposed upon the dissolved corporation.

Boss & Peake Automobile Co. v. *United States*, 290 Fed. 167, affirming 285 Fed. 410.

United States v. *McHatton*, 266 Fed. 602.

United States v. *Updike*, 1 F. (2d) 550; aff'd 8 F. (2d) 913; certiorari denied April 19, 1926, 46 Sup. Ct. Rep. 473.

CONCLUSION

The lower court committed error in holding that the Act was unconstitutional as applied to the creation by Mrs. Coolidge of the trust involved in this case. Also the court erred in holding that the transfer of real estate was not within the proper construction of the Act, and for these reasons its judgment should be reversed.

Respectfully submitted.

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DECEMBER, 1926.

O

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 48.

MALCOLM E. NICHOLS, Collector of Internal Revenue,
Plaintiff in Error,

v.

HAROLD J. COOLIDGE and AUGUSTUS P. LOW, Jr.,
Executors of the Will of Julia Coolidge.

BRIEF FOR THE DEFENDANTS IN ERROR

ROBERT G. DODGE,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Textbook Cited

Supreme Court of the United States

OCTOBER TERM, 1926

[No. 88]

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE, *Plaintiff in Error*,

v.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

BRIEF FOR THE DEFENDANTS IN ERROR

This action was brought in the District Court for the District of Massachusetts against Malcolm E. Nichols (now plaintiff in error) to recover the sum of $36,799.38 exacted by him as collector of internal revenue from the executors of the will of Julia Coolidge (now defendants in error) and paid under protest. The amount so exacted represented an additional estate tax which was assessed by the Commissioner of Internal Revenue under color of the Revenue Act of 1918 as the result of including in the "gross estate" (1) the value of certain property transferred by the deceased (who was a resident of Massachusetts and who died January 6, 1921) to trustees in 1907, and (2) the value of two parcels of real estate conveyed by her to her sons in 1917. The Commissioner assessed this additional tax on the ground that the transfer to the trustees and the conveyance to the sons were intended to take effect in possession or enjoyment at or

after the death of Mrs. Coolidge, and so came within § 402 (c) of the statute, which reads as follows:—

> "SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

At the trial (which was before Judge Brewster and a jury) it was agreed that certain facts might be treated as in evidence without further proof (R. 8). No other evidence was offered by either party, and each party requested the direction of a verdict (R. 17–19). Subject to the collector's exception, the judge instructed the jury to find for the executors in the sum of $40,417.98 (being the sum paid as above stated, with interest), and a verdict was returned accordingly (R. 7–28). The judge's reasons for thus directing a verdict are stated at length in the charge, which is set out in the bill of exceptions (R. 19–28) and is reported in 4 Fed. (2d) 112. He ruled, among other things, that the real estate above mentioned was not a part of the "gross estate" within the meaning of the Revenue Act of 1918 and that, in so

far as the act purported to authorize the inclusion of the trust property in the "gross estate", it was void because not an exercise of any power granted to Congress by the Constitution (R. 27). On April 3, 1925, judgment was entered in favor of the executors (R. 8). Since this was prior to the taking effect of the so-called Jurisdictional Act of February 13, 1925, the case was brought to this court by direct writ of error under §238 of the Judicial Code.

The Transfer to Trustees

On July 29, 1907, the decedent Julia Coolidge and her husband, each in his or her own right, transferred certain real estate and personal property, without consideration, to trustees who executed on the same day a declaration of trust providing that the net income should be paid to Julia Coolidge and her husband, three-sevenths to the former and four-sevenths to the latter, during their joint lives, that after the death of one the entire income should be paid to the survivor, that after the death of the survivor the trust property should be transferred in equal shares to their five sons and that, if any of the sons should have died before the survivor of the parents, his share should be paid to those entitled to take his intestate property under the statute of distributions, then in effect, except that a surviving widow should not take more than one-half of such share (R. 9–10). Of the property thus transferred to the trustees, the decedent furnished substantially three-sevenths and her husband four-sevenths (R. 11).

On April 6, 1917, Julia Coolidge and her husband executed and delivered an assignment to the same five sons of all their interest in the trust fund and all their right to receive the income therefrom; by the terms of the assignment, the trustees were directed thereafter to pay over the income to the five sons (R. 12).

The Conveyance of the Real Estate

By deeds dated May 18, 1917, Julia Coolidge conveyed to her five sons, by way of gift, two parcels of real estate, one in Boston and one in Brookline, Massachusetts, and the deeds were at once recorded in the proper registries of deeds. At the same time the sons executed and delivered to their parents a lease of each of these parcels of real estate, the leases being identical in all material respects except as to the description of the property (R. 13-16). Each lease was for the term of one year, reserved a rental at the annual rate of one dollar and "contained the usual covenants found in the form commonly used in Massachusetts" (R. 20). The leases provided for forfeiture by the lessees for breach of covenant, and contained this clause (R. 15):—

> "This lease shall be taken to be renewed for the term of one year from the end of the specified term, and thereafter shall be taken to be renewed from year to year unless written notice is given by either party to the contrary at least one month before the end of the original term or any renewal thereof."

Both parcels of real estate had been owned by the decedent for many years and had been occupied by her and her husband as places of residence. "When the aforesaid leases were made it was understood by the parties that, should the lessees desire to continue to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases would continue to be renewed from year to year during the lifetime of the lessees or either one of them" (R. 16).

The Assessment of the Estate Tax

The defendants in error, as executors of the will of Julia Coolidge made a return of the value of her estate as required by the Revenue Act of 1918, without including

the property conveyed to trustees as aforesaid or the real estate above referred to. According to this return, the gross estate amounted to $180,184.73 and the net estate to something over $102,000 (R. 8).

Upon a review and audit of the return, the Commissioner of Internal Revenue increased the gross estate "by adding thereto the value as of the date of death of Julia Coolidge (which value was $432,155.35) of that part of the trust property which was furnished by her as aforesaid, although as a result of changes in investments, etc., much of that property was no longer held by the trustees in specie at the time of her death" (R. 13); and "by adding thereto the value as of the date of the decedent's death of the two parcels of real estate above mentioned," the value being $274,300 (R. 16).

The inclusion of these items in the gross estate led to the assessment of an additional tax in the sum of $34,662.65 which, together with interest thereon amounting to $2,136.73, the defendants in error paid "under written protest and under duress" (R. 16).

If the property transferred to the trustees had been included in the gross estate and the two parcels of real estate had been omitted, the additional tax would have been $18,106.60. If the two parcels of real estate had been included and the trust property excluded, the additional tax would have been $9,507.03 (R. 17).

Judge Brewster's Rulings

The Government did not claim that either the transfer to the trustees or the conveyance of the real estate was made in contemplation of death (R. 22).

Judge Brewster ruled (1) that the conveyance of the real estate was not a transfer "intended to take effect in possession or enjoyment at or after" the death of the grantor and so was not within the purview of the statute

and that the Commissioner of Internal Revenue was, therefore, without authority to include its value in the gross estate (R. 22–23); (2) that, the transfer to the trustees was a transfer such as is described in the statute, but that, as Mrs. Coolidge had parted with all interest in the property before the passage of the act it is unconstitutional in so far as it purports to authorize the inclusion in the gross estate of the property transferred to the trustees (R. 23–27).

ARGUMENT

The executors submit that the judgment of the District Court should be affirmed for the following reasons:

I. The judge rightly ruled that the conveyances of real estate were not within the scope of the statute.

II. The trust property was wrongly included in the "gross estate" for—

1. The trust did not take effect in possession or enjoyment within the true meaning of the statute at or after Mrs. Coolidge's death;

2. If the Revenue Act of 1918 according to its true construction purports to authorize the exaction imposed with respect to the trust property, it is unconstitutional.

I.

The Judge rightly ruled that the Conveyances of Real Estate were not within the Scope of the Statute.

Inasmuch as each party requested a directed verdict, it is unnecessary to inquire whether, if the case had been submitted to the jury, a verdict for the defendant upon this branch of the case would have been warranted. The sole question is whether the judge was bound to rule that, as matter of law, the real estate constituted a part of the "gross estate."

Williams v. *Vreeland*, 250 U. S. 295.
Sena v. *American Turquoise Co.*, 220 U. S. 497.
Empire Cattle Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1.
Beuttell v. *Magone*, 157 U. S. 154.

1. In including the real estate in the "gross estate," the commissioner proceeded on the assumption that, notwithstanding the form of the transaction, a life estate was in effect reserved by the grantor. There is no claim that the real estate was conveyed "in contemplation of death," the Government's contention being, as the executors understand it, that there was a transfer to take effect at or after Mrs. Coolidge's death because it was expected, at the time the property was conveyed, that she and her husband would continue their occupancy as long as they might wish. Neither is it pretended that the conveyances were merely colorable or designed to evade payment of the estate tax. It is, nevertheless, asserted in the brief for the plaintiff in error that "the real understanding between the parties at the time these leases were executed was that, should the lessees desire to occupy the residences on the lessors' estates for the purposes of residing therein, the leases would continue during the lifetime of the lessees or either of them, *and to this extent the provision in the leases for termination was inoperative*" (p. 6; italics are ours) and that "the transaction contemplated, and the parties so understood, that the deeds were not to operate absolutely and that the leases were not to be terminable, but, on the other hand, that the grantors should have, use and enjoy the premises for their lives" (p. 22). These assertions are based solely on the passage in the agreed statement of facts which recites that, when the leases were made, it was "*understood* by the parties that, should the lessees desire to occupy the residences on the leased estates for the purpose of residing therein themselves, the leases

would continue to be renewed from year to year during the lifetime of the lessees or either of them" (R. 16; italics are ours). The word "understood" is manifestly insufficient as a foundation for assertions of this kind; while an agreement meant to be binding is sometimes described as an "understanding," this is not the ordinary meaning of the word, which, as has often been held, refers normally to an interchange of ideas not intended to be of legal efficacy and too vague to be a basis of legal proceedings in any event.

In *Camp* v. *Waring*, 25 Conn. 520, the question was as to the significance of a finding by a committee to the effect that there was in connection with a sale of real estate an "understanding" that the mortgage on the property "might remain unpaid for a number of years at least." It was held that this finding would not support a prayer for the reformation of the deed. The court said (at page 529):—

> "On a just construction of the report of the committee, we think that it is not found, as it should have been, affirmatively, if the fact was so, that it formed one of the terms of the agreement between the parties. Without taking time to comment at large on the language of the report, we think that, taking it all together, its fair import is, not that the parties intended to incorporate into their contract any positive or definite stipulation, by which either of them should be absolutely bound, as to the time for which payment by the plaintiff of the debt due to Mrs. Smith should or might be deferred, but only that what passed, in the negotiation which preceded and led to the contract, produced a mere expectation or belief that the debt would be suffered to lie for a number of years at least, unless enforced by Mrs. Smith. This construction or inference seems to be irresistible when we look at the precise terms in which it is stated that the parties 'agreed' in regard to the payment of that debt, in connection with the subsequent explicit finding.

as to certain points in regard to the delay of its payment, that there was no agreement between them, and the significant manner in which it is subjoined what the "understanding" was, in regard to that debt being permitted to lie. The context here shows that the word "understanding," always a loose and ambiguous one, unless accompanied with some expression to show that it constituted a meeting of the minds of parties upon something respecting which they intended to be bound, was used, not to express anything which was the subject of an agreement or contract between the parties, but only that kind of expectation or confidence upon which parties are frequently willing to rely without requiring any binding stipulation."

To the same effect are—

Tillman v. *Ogren*, 227 N. Y. 495.
Williams v. *Yazoo & Mississippi Valley Railroad*, 82 Miss. 659.
Black v. *Columbia*, 19 So. Car. 412.

There is nothing here to show that the word is used in any different sense. Even if the "understanding," however, had risen to the level of an agreement, it would have been unenforcible under the Statute of Frauds.

Mathews v. *Carlton*, 189 Mass. 285.
White v. *Wieland*, 109 Mass. 291.

The existence of an arrangement whereby no enforcible rights are reserved to the grantor and whereby his use of the property is, as in the present case, wholly dependent on the good will of the grantee, does not render the transfer one taking effect in possession or enjoyment at the grantor's death.

Matter of Hendricks, 163 App. Div. 413; affirmed 214 N. Y. 663.

Not only were the grantees at liberty to terminate the leases and enter into physical occupancy at the close of

any annual period, but, if they had sold the property,—as they were free to do at any time,—the purchaser would have had only to give the notice provided for in the leases (R. 15), in order to be entitled to eject the tenants at the close of the current year.

In *Matter of Jones*, 65 Misc. (N. Y.) 121, cited by the government, the deeds were retained by the grantor and were not recorded until after his death; throughout his life he continued not only to occupy the property but to deal with it as his own in all respects, retaining the income produced by it for himself. The facts in *People v. Shaffer*, 291 Ill. 142, were similar; the grantor seems even to have gone so far as to lease the property in his own name. These and the other cases cited on page 25 of the brief for the plaintiff in error merely show that the delivery of a deed of land by way of subterfuge to avoid taxation, where it is agreed that it is not in reality to take effect until the death of the grantor and where the latter remains in possession and exercises all the rights of ownership just as before, will not avail to prevent the inclusion of the property in the taxable estate of the grantor.

In the case at bar the transaction was in no sense a subterfuge. The deeds were delivered absolutely and were promptly recorded. The grantees could at once have sold the property, subject to one-year leases. The expectation then entertained by both parties that they would not do so, but would renew the leases, is, it is submitted, immaterial. The property was residential and produced no income. The grantors, by causing the deeds to be recorded and by accepting the leases, acknowledged in the most formal way that the property was not theirs and put it out of their power to deal with it as such. The reasoning of the District Court on this branch of the case is, the executors submit, unanswerable (R. 22):—

"The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

"The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantee did not come into full possession and enjoyment of the estate at the time of the conveyances,—and I am inclined to the opinion that they did,—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There was here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts."

In any event, the agreed facts certainly do not go to the extent of requiring a ruling as matter of law that the real estate should be included in the "gross estate; therefore the conclusion of the court below must stand.

In the brief for the plaintiff in error (p. 23), it is said that "the court proceeded on the theory that the written provision in the lease was the only enforcible arrangement" and that "in this he was manifestly in error," because "he overlooked entirely the doctrine of reformation of contracts." The simple reason why the point was not dealt with by Judge Brewster is that no such preposterous suggestion was made in the court below. There is not a scintilla of evidence to the effect that the

deeds and leases were executed through any mistake either of law or of fact and it is superfluous to point out that, while the existence of a mistake is by no means always a ground for reformation, there cannot, on any theory, be reformation if the parties were correctly informed as to the facts and if the documents have the precise legal effect which was intended. Moreover, even if Mrs. Coolidge had not been content,—as plainly she was,—to rely wholly upon the good will of her sons as to her occupancy of the property and had obtained from them something rising to the dignity of an agreement that she should continue to occupy during her life, a refusal by the sons to carry out this agreement and an insistence by them on the rights given them by the deeds and leases would have conferred upon Mrs. Coolidge no right to have the instruments reformed, whatever right of action she might have had for breach of the agreement. Failure to perform an oral agreement collateral to a written contract,—even though it be an agreement not to exercise the rights which the contract purports to create,—is never a ground for reformation.

In *Brosnihan* v. *Brosnihan*, 180 Wis. 360, the facts were practically identical with those assumed by the Government in the case at bar. The court said (at page 364):—

> "Does the situation so presented appeal to a court of equity so as to move it to order and adjudge the prayer for reformation, and is it within the province of a court of equity to afford relief under such circumstances? The parties dealt with each other at arm's length. From the standpoint of intelligence they must be deemed upon an equal footing. The transaction itself was not complicated but extremely simple. The absence of the required provisions was within the knowledge of both, and neither even suggested that anything had been omitted from the document or that they were to be inserted. The defendant relied upon the oral promise of her brother, and not upon

any agreement, stipulation, or reservation in the document itself. Under the evidence there was neither a mutual mistake of fact nor of law. The relief granted by the lower court, therefore, is such as neither of the parties contemplated and amounts to the making of a new contract, which the lower court, in the exercise of its equitable jurisdiction, had no power to award and which this court cannot grant."

To the same effect are—

Wilson v. *Deen*, 74 N. Y. 531.
Brintnall v. *Briggs*, 87 Iowa, 538.
Smith v. *Rust*, 112 Ill. App. 84.
Comerford v. *United States Fidelity & Guaranty Co.*, 59 Mont. 243.
Pickrell & Craig Co. v. *Bollinger-Babbage Co.*, 204 Ky. 314.

2. The position of the Government as to this branch of the case is, in any event, no stronger than it would be if the decedent had granted to the sons vested remainders in the real estate after life estates reserved to herself. If this had been true, the case would have presented the question which has been much discussed in the lower federal courts as to whether a transfer whereby there is created a vested remainder after a life estate reserved by the grantor takes effect in possession or enjoyment within the meaning of the statute at his death or at the time of the delivery of the instrument. The executors submit that the latter is the true construction of the statute, as has recently been held by the Court of Claims and by the Circuit Court of Appeals for the Second Circuit.

Arnold v. *United States*, 62 Ct. Cl.—(June 14, 1926).
Miller v. *United States* 62 Ct. Cl.—(June 14, 1926).
Frew v. *Bowers*, 12 Fed. (2d) 625.

In the case last cited the court said (at p. 627):—

"What is meant by the phrase 'take effect in possession or enjoyment at or after' the death of the trust creator? The natural inclination of every lawyer is to recognize that 'take effect' is not a phrase of art, to search for some artistic equivalent, and find it in the word 'vest.' But if, as the result of a passage of title the passing estate is vested, whether in fee, for life, in remainder, or in reversion, even though subject to divestment by subsequent event, then the transfer is complete, and so is the 'possession or enjoyment,' for one 'possesses and enjoys' a reversion as thoroughly as he does a fee, even though most men prefer a fee to a reversion.

"But if the transfer of an estate results in the immediate vesting thereof, and of each and every part of the same, the transaction is complete, and the grantor or transferor has no 'interest' left therein; wherefore on his death there can be found no such 'interest' to include in his gross estate.

. . . . . .

"We must first decide whether, within the meaning of the statute, Mr. Nash at the moment of his death had any *interest*, within the meaning of the act; we incline to hold that the applicable words should be treated technically, and that therefore there was no *interest* left from or arising out of the gift completed in 1910."

It follows from this reasoning that the action of the commissioner with respect to the real estate could not be sustained, even if his interpretation of the facts were correct.

II.

The Trust Property was wrongly included in the "Gross Estate."

1. THE TRUST DID NOT TAKE EFFECT IN POSSESSION OR ENJOYMENT WITHIN THE TRUE MEANING OF THE STATUTE AT OR AFTER MRS. COOLIDGE'S DEATH.

The District Court ruled that the interests of those whose shares in the trust property were subject to Mrs. Coolidge's life estate must be regarded as taking effect in possession and enjoyment at her death. If, as the executors submit, this ruling was wrong, the constitutional question becomes immaterial, since the reasons given for a decision are of no consequence if the decision itself is right.

Sullivan v. *Iron Silver Mining Co.*, 143 U. S. 431.

Wisner v. *Brown*, 122 U. S. 214.

(a) *After 1917 Mrs. Coolidge had no interest whatever in the Trust Property.*

The remainders created by the trust instrument as originally drawn were not contingent, but were vested, subject with respect to any particular remainderman to being divested in case he should die before the life estates fell in.

Blanchard v. *Blanchard*, 1 Allen, 223.

The case does not turn, however, simply on the fact that the remainders had become vested prior to the establishment of any estate tax, since the operation of the statute is vitally affected by the assignment. The effect of this assignment was to divest the settlors of all interest in the trust and to vest in the sons the entire beneficial interest. Each son, after the assignment, had an

equitable estate *pur autre vie* for the lives of the settlors, followed by an equitable remainder in fee. All that prevented the arrangement from becoming a mere dry trust, so as to entitle the sons to call for the immediate conveyance of the legal title, was the possibility that a son might die while one or both of the parents survived, in which event his next of kin were to take his share. Upon Mrs. Coolidge's death nothing moved from her or her estate and no interest theretofore enjoyed by her ceased. Her death had no effect whatever upon the trust property except as it affected the relation of third persons to it.

In view of the assignment the original transfer of 1907 is to be dealt with as if it had itself divested the grantors of all interest in the property. In this respect the case is like *Brown* v. *Gulliford*, 181 Iowa, 897, in which the court said (at p. 901):—

> "Though the deed, by reserving a life estate, worked liability to the tax, all this could be changed by terminating the reserved estate in the lifetime of the grantor and changing the grant by adding to [the] remainder the right to immediate possession and enjoyment."

The death of the grantors was to have no effect on the title except as terminating an element of uncertainty in the rights of the beneficiaries *inter sese*. If it had been provided that that element of uncertainty should be terminated upon some other event, such as the death of a third person, there would, even upon the Government's construction of the statute, be no tax. Can it be supposed that Congress intended to seize upon a distinction so unsubstantial and so irrelevant to the policy of the statute?

The view taken by Judge Brewster is opposed to the decision in *Curley* v. *Tait* (D. C. Md.), 276 Fed. Rep. 840. The facts in that case were more favorable to the Government than those in the case at bar. The decedent, one Grafflin, had transferred securities in trust to pay the

income to his wife during her life and after her death, if he survived her, to himself during his life, after which the securities were to become the absolute property of the transferee. The decedent's wife outlived him. In spite of the contingent interest retained by the grantor, it was held that there was no taxable transfer within the meaning of the statute, Judge Rose saying (at p. 842):—

> "If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another.

This opinion was followed by Judge Goddard in a decision (not yet reported) rendered August 19, 1926, in the District Court for the Southern District of New York in the case of *Irving Bank-Columbia Trust Co.* v. *Bowers*.

So, in *Fidelity & Columbia Trust Co.* v. *Lucas* (D. C. W. D. Ky.), 7 Fed. (2d) 146, it was held that the statute did not apply to a conveyance of real estate in trust to pay the income during the grantor's life to himself to be applied by him for the benefit of his children in such manner as he might in his uncontrolled discretion determine and thereafter to divide the income equally between the children. Judge Dawson said (at p. 152):—

> "Neither the possession nor the enjoyment of the property by the beneficiaries as a class was made dependent upon the death of Mr. Smith. The termination of the trust and the conveyance of the property to the beneficiaries was fixed without any reference whatever to the date of his death. His death neither hastened nor postponed the day when the beneficiaries as a class should come into possession or enjoyment of the estate. Upon the execution of the deed Mr. Smith completely divested

himself of all interest in and title to the property conveyed. It is true that by Paragraph 1 he provided that during his lifetime, or until he should otherwise in writing direct, the net income accruing during the trust period should be paid by the trustee to him, but it was not to be received by him for his own benefit; it was to be disposed of by him at his discretion, 'in the interest of the beneficiaries hereinafter named.' Any income received by Mr. Smith under this clause of the deed was received by him in trust for the beneficiaries therein named as a class—not for his own use. It was their money, belonging to them as a class, and not his, and at his death he had no interest or title in the property to pass."

In *Cleveland Trust Co.* v. *Routzahn* (D.C.N.D. Ohio) 7 Fed. (2d) 483, Judge Westenhaver held the decision in the case at bar inapplicable to a case in which the settlor had never surrendered the life interest which he had reserved at the creation of the trust, but agreed with the result in the present case because the assignment took the transfer out of the class contemplated by the statute. The judge said (at p. 485):—

"*Coolidge* v. *Nichols* (D. C.) 4 F. (2d) 112, decision by Brewster, District Judge, January 28, 1925, is also cited and relied on by plaintiff's counsel. The reasoning of the judge supports plaintiff's contention, but the facts are not parallel. The property was transferred to a trustee with the income during life reserved to the donor and the principal payable to certain beneficiaries at or after death. Prior to the passage of the Revenue Act of 1918, the donor and life beneficiary had transferred all interest therein to the remaindermen. The death of the life tenant did not take place until more than two years had elapsed after the last transfer, so that the transaction was not one presumptively made in contemplation of death, and could be brought within the statute only by affirmative proof that it was made in contemplation of death. After the life beneficiary had transferred her

interest to the remaindermen, a naked or dry trust was left in the trustee. It seems to me that, whatever may have been the nature of the transfer when the trust was first created, it had ceased to be a trust created to take effect in possession or enjoyment at or after the death of the donor when the donor relinquished her remaining interest, or that it took effect in possession and enjoyment at that time and not at or after death. The case might well have been disposed of, it seems to me, on this view."

Judge Brewster failed, it is submitted, to give due weight to the principle that tax laws are to be construed in favor of the taxpayer and that a construction which raises serious doubts as to the constitutionality of a statute is to be avoided whenever possible. In view of his own ruling that the statute as construed by him is unconstitutional and the similar decision by the Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. (2d) 625, it is apparent that the constitutionality of the statute when so construed is at least open to grave question. It may be supposed that the judge would have given these rules of construction more weight if he had had before him the application of them made by this court in *Lewellyn* v. *Frick*, 268 U. S. 238, some months after the present case was tried. If there is any difference in this respect between the section of the Revenue Act of 1918 considered in *Lewellyn* v. *Frick* and that now in question, it is that the construction of § 402 (*f*) adopted in *Lewellyn* v. *Frick* in order to avoid constitutional difficulties is less obvious than the construction of § 402 (*c*) for which the executors now contend.

Judge Brewster seems, on the other hand, to have attached undue importance to cases like *State Street Trust Company* v. *Treasurer and Receiver General*, 209 Mass. 373, in which various state laws have been construed as intended to impose a tax in situations more or less like that now presented. It is suggested in the

brief for the plaintiff in error (p. 17) that these state laws in some instances impose "taxes on the right to receive" and in others "taxes on the right to transmit." Assuming for the sake of argument that this statement is correct, the fact remains that under the state laws in question the basis of the tax is what the distributees receive and not what passed from the decedent at his death. Under the state laws a tax is assessed with respect to each of the several interests acquired by the distributees and varies in each case according to the value of the interests received and other circumstances peculiar to that interest, whereas the federal estate tax (with a few exceptions not now material) is assessed without reference to who the distributees are or how the property is divided among them. It is, therefore, much more consonant with the general scheme of the Revenue Act to construe it as intended to establish as the basis of the tax only property in which the decedent had an interest at the time of his death, and this construction appears to have been approved by this court in *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, the Chief Justice saying (at p. 50):—

> "What was being imposed here was an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death."

Again, in *Edwards* v. *Slocum*, 264 U. S. 61, the court said (at p. 62):—

> "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent. . . . It comes into existence and is independent of the receipt of property by the legatee. It taxes, as Hanson, Death Duties,

puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.' "

So, in *Wardell* v. *Blum*, 276 Fed. Rep. 226, it was held by the Circuit Court of Appeals for the Ninth Circuit that under the present statutes of California with respect to "community property" the part of such property which goes to the wife is not comprised in the husband's estate and that the part of the "community property" so going to the wife cannot, therefore, be taken into account in determining the estate tax payable by the husband's executors, although the husband had the entire management and control of the "community property" during his life. The court said (at page 227):—

> "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased'; from which the conclusion is inevitable that the property upon which such tax is imposed must in truth be the property of the deceased."

Moreover, the circumstance that an estate tax has reference to the interest which ceases at death, whereas a succession tax looks to the interests of the distributees, is not, as Judge Brewster seems to have assumed, the only point of difference. Equally, if not more important, is the fact that an estate tax is payable by the executor as a debt of the estate, whereas a succession tax with respect to property conveyed by the decedent to trustees in his lifetime is payable out of the trust property. Under the state laws, therefore, the result of holding that a change in the relation of the beneficiaries to the property upon the death of the settlor is a transfer taking effect in possession or enjoyment at his death is simply to subject the trust property to taxation. Hence there is no peculiar element of hardship to indicate that such taxation could not have been intended. Under the federal law, on the contrary, it would follow from the construction advo-

cated by the Government that the amount payable by the executor might be indefinitely increased through the mere accident that the decedent had named his death as the happening upon which there was to take place some change in the rights of the beneficiaries *inter sese* under a deed which he had executed in his lifetime and by which he had divested himself of all interest whatsoever. Since the executor has no remedy over against the trustees or beneficiaries under a deed of this kind, such a construction must inevitably cause great unfairness and the intention to bring about so unjust a result ought not to be imputed to Congress if the language will fairly bear another construction.

The application made of this principle in *Knowlton* v. *Moore*, 178 U. S. 41 (at p. 76), to the construction of the War Revenue Act of 1898, is exceedingly pertinent:—

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory

are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel, tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

The decision rendered by the Supreme Court of Rhode Island in *Manning* v. *Board of Tax Commissioners*, 46 R. I. 400, a few days after the case at bar was tried, is also persuasive in this connection. Rhode Island, unlike most of the States, has both an estate tax law and a succession tax law. A testatrix left property in trust for her son during his life and gave him a power to appoint the property by his will. The son left a will which was construed as not constituting an exercise of the power, so that the property passed in default of appointment as directed in his mother's will. It was held that a succession tax was payable by the devisee who thus took in default of appointment, but that the son's estate was not chargeable with an estate tax. Although the estate tax law contained very broad language with respect to property

passing either through the exercise of a power or in default of appointment, the court declined to construe the law as intended to require that the property under consideration be deemed a part of the son's "net estate" for the purposes of the estate tax. The court said:—

> "To warrant a finding that it was the intent of the General Assembly to impose the estate tax in question at the death of the non-resident George A. Hill, it must be found that the subject of the tax, or some interest therein, was a part of his net estate. George A. Hill did not exercise the power of appointment, and we have said above neither the real property nor any interest therein was in law or in fact a part of his net estate. Neither can we find in the language of the act such a clear legislative intent to treat it as a part of his net estate as to permit a construction of the act which will support the assessment. . . . It may be conjectured that it was the intent of the General Assembly to include in such net estate, in Rhode Island, property in which he had no legal interest, but as to the succession to which he had failed to make an appointment under a power. The intent thus to burden a decedent's estate with the payment of an inheritance tax upon the transfer of property which was not his, and did not pass under his will or by the statutes of descent, is so unreasonable and unjust that we will not find the intent upon conjecture, but will require that the purpose be explicitly declared."

It is suggested in the brief for the plaintiff in error that, up to the time of Mrs. Coolidge's death, there was a possibility that all her five sons might die before her and leave no issue, in which event she would come in as one of the next of kin. That the termination of such an ultra-attenuated interest could not have been contemplated by Congress as an occasion for taxing the estate on the whole value of the trust property seems manifest.

Bradley v. *Nichols* (D. C. Mass.), 13 Fed. (2d) 857.

The argument is based, however, on a misinterpretation of the trust indenture. The next of kin who are to take in case the sons predecease the survivor of the settlors are those entitled as such "under the statute of distributions in effect at the death of such survivor"; in other words, the next of kin are to be ascertained at the death of the surviving settlor, so that neither settlor could come within the class.

Proctor v. *Clark*, 154 Mass. 45.
Fargo v. *Miller*, 150 Mass. 225.
Knowlton v. *Sanderson*, 141 Mass. 323.

Apart from this, the assignment carried not only the interest of the settlors in the income, but whatever interest they may have had in the principal as well, so that, after the execution of the assignment, the settlors on any theory had no right in the trust property either vested or contingent.

The Government bases its argument largely on the proposition that gifts like those now in question are really testamentary in character. Whatever may be the case with regard to the ordinary gift in contemplation of death, or gifts in which life estates are reserved to the donors, it is submitted that there is no element whatever of the testamentary in an irrevocable gift by A to B for the life of A with remainder to B's heirs in fee.

It follows that the jury should have been instructed (in accordance with the executors' sixth request) that "the property referred to in the first count of the declaration as having been conveyed by Julia Coolidge to trustees was not a part of her 'net estate' within the meaning of the Revenue Act of 1918" (R. 17) and that the constitutional question is, therefore, immaterial.

(b) Without Reference to the Assignment of 1917 the Statute should not be construed as applicable to the Transfer of 1907.

Even if the assignment had not been executed, the result would be the same. Since the remainders were vested, the transfer, on the principle discussed in the second subdivision of the preceding section of this brief, took effect in possession and enjoyment upon the creation of the trust and not upon the death of Mrs. Coolidge. This principle applies, indeed, with especial force in view of the fact that the trust was created long before the federal estate tax was established. As was pointed out by the Court of Claims in *Miller* v. *United States*, (cited on p. 13, *supra*), the argument against a construction which would give rise to a tax is peculiarly strong in a case of this kind. The result is not varied by the fact that the possibility that the remainders might be divested was to cease upon the falling in of the life estates. The mere circumstance that this element of uncertainty as to which beneficiary should take would then be removed did not make the trust one taking effect in possession or enjoyment at that time.

> *Matter of Sherman*, 30 Misc. (N. Y.) 547.
> *Dexter* v. *Treasurer & Receiver General*, 243 Mass. 523.

Again, it is only by an unnecessarily literal construction of the words "created before or after the passage of this act" in § 402 (c) of the statute that the inclusion of the trust property in the "gross estate" can be upheld. Section 401 imposes an estate tax "in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917." Neither of these earlier acts contained anything purporting to impose a tax with respect to interests which had become vested prior to the establish-

ment of a federal estate tax. When the Act of 1918 imposes a tax "in lieu" of the taxes imposed by the earlier acts, the presumption is that it was intended to tax only such subjects as were within the scope of the former acts and that the words "whether created before or after the passage of this act" were meant to remove any doubt as to whether, with regard to transfers made after the estate tax was established but before the Act of 1918 was passed, the earlier acts or the Act of 1918 governed. Adequate scope can thus be given to the words "before or after" without construing them as indicating an intent to impose a tax with respect to interests which had become vested at a time when there was no federal estate tax of any kind. Congress may also be presumed to have appreciated the difference as regards the hardship caused by the tax between transactions completed at a time when no one contemplated a federal estate tax and those effected after such a tax had become a recognized part of the national fiscal system. Under the familiar rule as to the strict construction of tax laws, therefore, the Act of 1918 should be construed as not applicable to transfers made or trusts created before the Act of 1916 was passed.

Gould v. *Gould*, 245 U. S. 151.

If the words "has at any time made," etc., in the Act of 1916 mean, as was held in *Shwab* v. *Doyle*, 258 U. S. 529, "has at any time subsequent to the passage of this act made," etc., there can be no difficulty in construing the words "created before or after the passage of this act" in the Act of 1918 as meaning "created before or after the passage of this act, if created after the passage of the Act of 1916."

In the alternative, the statute might well be construed as applying to gifts antedating its enactment only where the taking effect of the gift at or after the death of the

donor was dependent on some act of his *after* the enactment of the statute; that is to say, where a power of revocation or a power of appointment had been reserved by the terms of the gift.

2. If the Revenue Act of 1918 according to its true Construction purports to authorize the Exaction imposed with Respect to the Trust Property, it is unconstitutional.

(*a*) *The Power of Congress to impose Exactions under the Name of Excises is not unlimited.*

The authority of Congress to enact a provision like that now in question must be found, if at all, in Section 8 of Article 1 of the Constitution, which grants power "to lay and collect taxes, duties, imposts and excises." While the Government argues that these words vest in Congress a wide discretion, it is not contended that any exaction which Congress may see fit to ordain under color of this provision is unassailable. The recent decisions of this court make it plain that the name given by Congress to a particular exaction is immaterial. If the object sought is one not fairly within the scope of the taxing power, it cannot be attained under the pretext of exercising that power.

> *Trusler* v. *Crooks*, 269 U. S. 475, 482.
> *Linder* v. *United States*, 268 U. S. 5, 17.
> *Lipke* v. *Lederer*, 259 U. S. 557, 561.
> *Child Labor Tax Case*, 259 U. S. 20, 38.

Again the words "taxes," "duties," "imposts" and "excises" all import some rational basis for classification. If an act of Congress imposes burdens upon some particular citizen or class of citizens singled out for no relevant reason, this is not an exercise of the taxing power, but is a mere arbitrary exaction and not within any power granted to Congress by the Constitution.

The test, as this court has said in a recent case, is whether the classification "is reasonable and not merely arbitrary and capricious."

Barclay v. *Edwards*, 267 U. S. 442, 450.

So, in *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, the court said (at p. 24):—

> "This doctrine [*i.e.*, that the power of taxation granted to Congress by Article I of the Constitution is not cut down by the Fifth Amendment] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

The power of classification enjoyed by Congress under Article I of the Constitution is not, in fact, substantially different from that conferred upon the legislatures of the States by the corresponding provisions of the state constitutions. The well-recognized limitations upon the power of a state legislature to classify persons or property for purposes of taxation were not brought into being by the Fourteenth Amendment, which, as was said in *Keeney* v. *New York*, 222 U. S. 525 (at p. 535), "does not diminish the taxing power of the State." So far, indeed, as the matter of taxation is concerned, the amendment merely re-enacts a limitation which is implied in the several state constitutions.

Lexington v. *McQuillan*, 9 Dana, 513, 517.
Thompson v. *Kidder*, 74 N. H. 89, 91.
Kitty Roup's Case, 81½ Penn. St. 211.

This is illustrated by a recent case in which this court has stated the extent of the States' taxing power in terms almost identical with those used in other cases to define the taxing power of the United States:—

> "A state tax law will be held to conflict with the Fourteenth Amendment only where it proposes or clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation —'to spoliation under the guise of exerting the power of taxing.'"
>
> Clarke, J., in *Dane v. Jackson*, 256 U. S. 589 (at p. 599).

(b) *The Tax is upon all the Transfers of the various Kinds specified in the Statute, not simply upon the Transfer of the "Estate" in the ordinary Sense, i. e., the Property subject to Distribution by the Decedent's Executor or Administrator.*

The value of the "net estate," according to § 403 of the statute, is to be ascertained by deducting certain items from the value of the "gross estate." It is provided in § 402 that the value of the "gross estate" is to be determined by including, among other things, the value at the time of the decedent's death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) except in case of a bona fide sale for a fair consideration in money or money's worth." Section 401 provides that "a tax equal to the sum of the following

percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act." The question at once arises as to what is meant by "the transfer of the net estate." If this language refers to the transfer of the various classes of property considered in arriving at the value of the "net estate," it follows that, in so far as property transferred prior to the establishment of the tax is taken into account, the tax is on the transfer of that property in the past. Counsel for the Government recognize the great difficulty of sustaining such a tax, and so put forward the theory that what is taxed is the transfer of the property actually owned by the decedent at the time of his death and that the value of the property transferred in the past is a mere measure. This position is stated as follows in the brief for the plaintiff in error (pp. 25–27):—

> "This Court has said that the Federal Estate Tax is a tax imposed upon the transfer of a decedent's net estate; that the occasion of the tax is the cessation of his interest in property. The nature of the tax as stated by this Court in *Young Men's Christian Association of Columbus, Ohio*, v. *Davis*, 264 U. S. 47, is as follows (p. 50): [quoting the passage already quoted on p. 20 of this brief].
>
> "Neither the plaintiff in error nor the defendant in error attacks this description of the Federal Estate Tax, but starting from this fundamental conception of the tax the argument of the defendant in error departs from that of the Government in its conception not only of the 'transfer' which is taxed but also of the property which composes the 'net estate.' The defendant in error bases his argument upon the conception that the transfer which is taxed is any transfer within the description of Section 402 of the Act, and that the net estate which is transferred is composed of the property described in Section 402,

less the deductions described in Section 403. The Government, on the other hand, considers that, since the tax is upon the cessation of the decedent's interest in property and is occasioned by death, the transfer which occasions the tax is necessarily that transfer which takes place at death, and that the 'net estate,' the transfer of which is taxed, is necessarily the decedent's property at the time of death. The 'net estate' refers not to the property described in Section 402 of the statute but to the net estate as commonly understood—to the property and interests in property which the decedent actually owned at the time of his death above his liabilities."

This argument flies in the face of the statute. Section 409 provides that the tax "shall be a lien for ten years upon the gross estate of the decedent", meaning by "gross estate," as the subsequent provisions unmistakably show, all the various classes of property enumerated in § 402. Section 409, moreover, provides that, if the decedent makes a transfer of property intended to take effect in possession or enjoyment at or after his death and if the tax "*in respect thereto*" is not paid when due, the transferee shall be personally liable. How Congress could more plainly have declared that the tax is in part imposed upon all such transfers is not easy to see. Neither is it apparent how the value of property transferred by the decedent in his lifetime can be deemed a mere measure of a tax on the transfer of the estate properly so called, if the person to whom the transfer was made by the decedent is liable to the tax "with respect" to such property.

If confirmation of this view is needed, it is found in § 401. By the express language of this section the tax is to be equal to certain percentages of the value of the "net estate (determined as provided in § 403)." The Government's theory involves the assumption that, when in the next line of § 401 the statute says that the tax is imposed "upon the transfer of the net estate," the

words "net estate" are used in a sense entirely different from that in which the same words have been used just before. It likewise involves the assumption that, although prior to the establishment of the estate tax the term "net estate" was not in common use and had acquired no well-defined meaning, this expression, when used to describe the subject of taxation, was left with no definition at all, in spite of the care taken by the framers of the statute to specify the meaning of less important words.

It necessarily results from the Government's theory that, if a decedent owns no property whatever at the time of his death, no tax can be collected from anybody. Before property previously transferred can be used as the "measure" of a tax on the transfer of the "estate" in the ordinary sense, there must be an "estate" to which the tax may attach. The position now taken by the Government, therefore, is exactly the opposite of that taken in *Levy* v. *Wardell*, 258 U. S. 542, in which the decedent left no property of any kind, but in which the Government strenuously contended that there was a tax with respect to property transferred by him in his lifetime.

It is said in the brief for the plaintiff in error (p. 11) that "certain property which is included in the gross estate is not the occasion of the tax either directly or by reason of its transmission, for some unidentified part of the property included in the gross estate is excluded from the estate which gives rise to the tax," and (p. 27) that "the *value* of the gross estate is to be *determined* by a statutory rule of values which may or may not conform to the facts." This argument does not help the Government, because the deductions are taken indiscriminately from all the property comprised in the "gross estate." If, because of these deductions, it was correct to say that the tax was not on the transfer of property conveyed by the decedent in his lifetime, it would be equally true that the tax was not on the transfer of the

property owned by him at his death. If the latter proposition is unsound,—and it must be, since otherwise there would be no transfer of any kind to which the tax could attach,—the fact that deductions are allowed does not make the exaction any less a tax on the transfer of the property conveyed before death than a tax on the transfer of the property actually passing from the decedent at death.

The idea that the "net estate" whose transfer is taxed is the property subject to administration and not the property whose value constitutes the basis of the tax is also inconsistent with the provision of § 408 as to the payment of taxes assessed with respect to insurance policies:—

> "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate."

The "gross estate," it will be seen, is spoken of in this passage as "consisting," among other things, of the proceeds of insurance policies not payable to the executor, while the part of the tax recoverable by the executor from the beneficiaries is to be computed according to the ratio between such proceeds and the "net estate." It is inconceivable that Congress meant that the amount chargeable to the beneficiaries of insurance policies should be calculated with reference to the "estate," strictly so called, when the total tax to which such beneficiaries are required to contribute is figured on a basis entirely different; the passage is intelligible only on the assumption that Congress understood "net estate" to mean the "gross estate" less the statutory deductions. Indeed, the inconsistency of § 408 with the measurement theory has been declared by this court in *Lewellyn* v. *Frick*,

268 U. S. 238. With reference to the personal liability imposed by this section upon the beneficiaries of insurance policies, Mr. Justice Holmes said (at p. 251):—

> "In view of their liability the objection [that the tax constitutes a taking of property without due process of law] cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax."

All these considerations show that the tax is upon all the transfers of the various kinds specified by the statute, *i. e.*, the present transfer of the property owned by the decedent at the time of his death and all past transfers of the kinds specified in the statute.

(c) *Whether regarded as imposing a Tax on past Transfers or as using past Transfers as the Measure of a Tax on the actual Transfer which takes Place at the Decedent's Death, the Statute, as applied to the Facts now appearing, is unconstitutional.*

(i) If the foregoing analysis is correct, the answer to the constitutional question seems plain.

It is unnecessary to debate at length the broad issue as to whether the statute is valid as applied to situations in which the decedent, as an incident to a transfer made before the estate tax was established, retained a life interest followed by a vested remainder. If that question were presented, this court would, it is believed, recognize the soundness of the many decisions in which various state courts have held that an attempt to tax such past transfers constitutes a taking of private property without compensation. In the leading case of *Matter of Pell*, 171 N. Y. 48, the court said (at p. 55):—

> "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enact-

ment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

To the same effect are—

Matter of Lyon, 233 N. Y. 208.
Hunt v. *Wicht*, 174 Cal. 205.
State v. *Probate Court of Washington County*, 102 Minn. 268.
Houston's Estate, 276 Penn. St. 330.
Commonwealth v. *Wellford*, 114 Va. 372.
Lacey v. *State Treasurer*, 152 Iowa, 477.

If a succession tax cannot be imposed in such a situation, the same is true *a fortiori* as to an estate tax. With respect to a succession tax, it may be argued with a certain plausibility that the remainderman's coming into actual possession is a "taxable occasion," but this is not the case as to an estate tax, since the only act done or privilege exercised by the grantor was in the past.

In *Wright* v. *Blakeslee*, 101 U. S. 174, the interest with respect to which the tax was imposed was wholly contingent until the settlor's death, so that the principle upon which the decision in *Matter of Pell* rests was inapplicable. *Scholey* v. *Rew*, 23 Wall. 331, is even less pertinent, as the transfer in that case took place under the will of a person who died after the establishment of the tax.

The present question, however, is not whether the rule laid down in *Matter of Pell* should be followed by this court to the full extent. It will be remembered that the trust was created in 1907 and that the assignment was executed in 1917. While the Revenue Act of 1916 was in force at the date of the assignment, that act did not assume to include in the "gross estate" property held under irrevocable trusts established before its enactment.

Shwab v. *Doyle*, 258 U. S. 529.

The situation now presented, therefore, is an attempt by Congress to tax a transfer whereby an owner of property had, at a time when the transfer was in no way taxable, divested herself of all interest in the property and of all control over it. Such a tax must, of course, be sustained, if at all, as an excise, since it is not apportioned among the States according to population. That it cannot be supported as an excise seems equally clear when the nature of an excise is considered. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, this court (at p. 151) adopted the definition of excises given in Cooley on Constitutional Limitations, 7th Ed., 680, *i.e.*, that excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." So, in *Thomas* v. *United States*, 192 U. S. 363, the court said (at p. 370) with reference to the words "duties, imposts and excises" appearing in Article I of the Constitution:—

> "We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Since an excise *ex vi termini* is thus a tax upon the doing of some act or the exercise of some privilege, a tax

based solely upon the fact of having done some act or exercised some privilege in the past cannot be sustained as an excise. The principle was stated as follows in a decision (as yet unreported) rendered by Judge Geiger in the United States District Court for the Eastern District of Wisconsin on November 22, 1926, in the case of *Lefeber* v. *Wilkinson*. The question was whether the retroactive provisions of the Revenue Act of 1924 as to the gift tax could be sustained as establishing an excise, and the court said:—

> "The whole proposition comes down to the single direct statement: can an excise tax be effective other than *in futuro?*
>
> "The case comes here really with the necessity, as I might say, of deciding the case definitively. The proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an "excise"; I mean, the so-called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or, as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing, you can do it with the burden attaching to you, which we will now impose on you.'
>
> "Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.
>
> "Now, when that is so, the question is particularly asked. Here are the gifts made in February and May,

1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and LeFeber donors should be told on June 2, 1924 that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable*?"

As to interests vested before the establishment of an estate tax, no new act is done and no privilege is exercised after the passage of the tax law. The actual entering into the occupation or usufruct of the property is one of the inherent incidents of ownership and a tax upon it, whatever its name, is not an excise, but a tax on the property.

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288.

In *Matter of Craig*, 97 App. Div. 289, this principle was applied to the transfer tax law of New York, Hirschberg, P.J., saying (at p. 296):—

"I do not lose sight of the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

This decision was affirmed by the Court of Appeals on the opinion of the Appellate Division (181 N. Y. 551).

The applicability of these principles is virtually conceded by the Government, since it is said in the brief for the plaintiff in error (p. 30) that "the provisions relating to the measure of the tax have been made to include transactions not in themselves taxable transactions." Elsewhere in the brief (p. 39) it is asserted that "a retroactive excise is constitutional," but the argument is manifestly half-hearted. That the proposition just quoted cannot be sound is apparent on its face, unless it is taken as meaning merely that something in the past, *e.g.*, income received during a preceding year, may sometimes be used as the measure of an excise on a present transaction. As is shown by the cases cited on pages 39 to 42 of the brief for the plaintiff in error (such as *Billings* v. *United States*, 232 U. S. 261) administrative considerations sometimes make it necessary to use as the initial measure of an income tax or other tax recurring at regular intervals a short period immediately preceding the enactment of the tax law and, when this is true, it may not be possible to say that the measure of the tax has so little relation to the subject taxed as to render it "arbitrary and capricious." This, however, is entirely different from saying that an exaction based upon an isolated transaction which occurred many years before the statute was enacted can be regarded as a "tax" in any proper sense.

It will be remembered in this connection that a general income tax is a direct tax and not an excise, so that retroactive provisions with respect to such a tax do not come within the rules governing excises and may well be valid, even if a retroactive excise would be void.

The Government's assertion cannot be right in any broad sense, unless it be that there is no limit to the unjust and oppressive exactions which may be imposed

under the name of excises. It certainly is not true, for example, that a person who made a sale of real estate twenty years ago may now be required to pay as an excise a percentage of the price. If so, there is no foundation for imposing after the death of a settlor a tax on a transfer which was in all respects complete and irrevocable and by which, at a time when the transaction was not taxable, he divested himself of all interest in the property and of all control over it.

(ii). The result is the same if it be assumed that by some process the statute may be taken to mean exactly the reverse of what it says it means and may be construed as imposing a tax only upon the transfer of the decedent's "estate" in the ordinary sense, using the value of the property transferred in his lifetime as a measure of the tax. The fundamental difficulty still remains, for the reason that, if the past transfer cannot itself be taxed, the obstacle cannot be evaded by imposing the tax ostensibly on something else and measuring that tax by the non-taxable transfer.

"One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania

could tax according to such a standard, other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others."

Van Devanter, J., in *Frick* v. *Pennsylvania*, 268 U. S. 473 (at p. 494).

Apart from this well-settled principle, the tax, as it affects the present situation, is, to apply the test laid down in *Barclay* v. *Edwards*, 267 U. S. 442, "merely arbitrary and capricious." The measure of a permissible excise must, as the Government virtually concedes, have some reasonably close relation to the subject taxed. Thus, it will probably not be argued that a stamp tax on deeds measured, not only by the value of the property conveyed, but also by the value of other property conveyed many years previously, could be sustained an excise. In the case at bar Judge Brewster stated as follows his reasons for deeming this principle applicable to the facts before him (R. 26):—

"From the agreed facts it must be admitted that the property sought to be included as a part of the decedent's estate belonged to others at the time of her death. Clearly, there must be some limitation to the power of Congress to exact a tax on one measured by property of another. I take it the Government would not seriously contend that an estate tax could be levied upon the estate of A, to be measured by the value of B's property, when neither the property of B nor the manner of its acquisition bore any reasonable relation to the subject matter of the tax.

"I am unable to perceive on what grounds it could be successfully claimed that the transfer in question, or the property transferred, could be said to bear any reasonable relation to the thing taxed. If, at the time of her death, the decedent had some interest in the property which terminated by reason of said death, or if, at the time the transfer was made, it was taxable, a different situation would arise. In the case before us neither of these conditions exist. The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death, because both are transfers in the nature of testamentary dispositions and could be easily resorted to for the purpose of evading the tax. I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer, if completed before the effective date of the law. In every case of transmission by will, intestate laws or transfers to take effect after death or in contemplation of death, a power, right or privilege has been exerted or exercised. When one has availed himself of this privilege with knowledge of the tax, actual or constructive, he has voluntarily subjected himself to its burden, and a statute which includes in the measure of the tax the value of the property thus transferred may well be deemed to have provided a reasonable classification, and this even if the decedent has entirely parted with all interest in the property; but when one has, prior to the imposition of the tax, parted with all control over or interest in the property, the classification becomes arbitrary and unreasonable."

In *Frew* v. *Bowers*, 12 Fed. (2d) 625, the Circuit Court of Appeals for the Second Circuit went still further and held that the statute was invalid even as applied to a trust under which the settlor retained a life interest. Judge Hough said (at p. 628):—

"If the technical instruction is wrong, then we must face the question whether it is within the power of Con-

gress to do what has been done; *i.e.*, use the property of A. as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious.' *Barclay* v. *Edwards*, 267 U. S. 442, 450. Further, a tax on a transfer by A., but measured by anything other than the estate of A., may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn* v. *Frick*, 268 U. S. 238 at 251.

"If it be said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away $200,000 in 1910? If that be assumed as possible, it is not possible that the tax so laid, and computed on the gift, its credits and gains, could ever be an excise on the transfer.

"But if the tax be laid as it actually has been, and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of a duty, and laying a tax in order generally to regulate some subject taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. *The Child Labor Case*, 259 U. S. 20, is the leading example."

The present case, as Judge Brewster points out, does not involve the question as to how far a transfer made after the tax has been established may be used as the measure of a tax imposed upon the transfer of the settlor's estate at his death. It may be that, where the settlor has notice at the time he makes the transfer, that this transfer will be taken into account in fixing the estate tax at his death, the objection of capriciousness and irrelevancy does not apply to the same extent, but that point is not now before the court.

Neither is it necessary to discuss the power of Congress to take account of transfers *inter vivos* in order to make the tax upon the transfer of decedent's estates effectual. A tax upon an irrevocable transfer made before the tax was established cannot be upheld on this ground.

Schlesinger v. *Wisconsin*, 270 U. S. 230.

The suggestion in the brief for the plaintiff in error (pp. 47 and 48) that "Congress has a right to prevent any person from disposing of any property gratuitously unless provision is made for taxes" and that Congress "can avoid voluntary conveyances which operate to deprive the Government of its power to collect its taxes," is manifestly irrelevant as applied to such transfers; indeed, it is frankly stated in the brief for the plaintiff in error (p. 20) that the purpose of Congress in undertaking to extend the tax to past transfers "was not to prevent evasions of the tax."

It will also be observed that, if the statute is construed as applying to the present situation, it means that, if an owner of property gives it to A for the life of the donor, with remainder to B in fee, there is a tax, but that, if he gives it to A for his own life and then over, there is no tax. This is an utterly irrational distinction and is in itself enough to show that, if the construction urged by

the Government is adopted, the statute is manifestly "arbitrary and capricious."

The Government argues that the object of the provisions now in question was to make the tax operate with equality. If so, they were strangely misconceived. In the briefs filed by the various *amici curiae* appear many illustrations of the extraordinary inequality and injustice which not only is theoretically possible but is certain to arise in the application of the statute to situations frequently occurring.

In the first place, it may happen that, as the result of an exaction which could not possibly have been foreseen, the entire property owned by a settlor at the time the tax was established is appropriated to the payment of the tax, so that he is powerless to make provision for those having the strongest claims upon him. This has actually happened with regard to the estate of Anne B. Austin, in the interest of whose executor Isaac B. Lipson, Esq., has filed a brief as *amicus curiae* in the case at bar; as appears from Mr. Lipson's brief, the result, if the tax is sustained, will be that the entire property left by the testatrix will be exhausted, so that her husband, who took nothing under the first indenture which she had executed long before any federal estate tax was thought of and for whom she undertook to provide by her will, can receive nothing.

A second difficulty arises from the provision that the recipient of a transfer made by the decedent in his lifetime shall be personally liable, if the tax is not paid by the executor. The effect of this is to make the liability of the recipient dependent on the fortunes of the grantor subsequently to the making of the transfer. If a person transfers substantially his entire property and thereafter acquires additional property, so that at his death his estate is equal to the amount of the tax, the recipient of the property transferred in his lifetime is free from lia-

bility. On the other hand, if the grantor, although retaining ample property at the time he made the transfer, meets with reverses, so that his estate is insufficient to pay the tax, the recipient is charged with liability. Nothing, it is submitted, could be more purely "capricious" than a liability thus dependent on circumstances wholly fortuitous and incapable of being foreseen.

Once more, the property transferred by the decedent in his lifetime is not taken at its value at the time of the transfer but at its value at the date of death. During the interval it may have happened, as in the case at bar, that the investments have been largely changed, yet the tax is nevertheless on the value at that time of the property originally transferred. The tax, therefore, bears no relation either to the original amount of the gift or to the property which comes into possession upon the settlor's death. A hypothetical case makes this clear.

In 1900 an owner of real estate then worth $100,000 transfers it to trustees, reserving a life interest. The value of the real estate which was the original subject of the trust has increased to $500,000 when the settlor dies in 1920. Soon after the establishment of the trust, however, the real estate is sold and the proceeds invested in other property which greatly depreciates, so that the actual value of the trust property at the date of the settlor's death is only $5,000. The estate in the hands of the executors is insufficient to pay the tax. The donees are personally liable for exactly the same amount as if the original investment had been retained, although the property which they actually receive is equivalent only to a minute fraction of the value of that originally held.

The unreasonableness of the tax may be further illustrated by supposing that many years before the tax was established an owner of property so transfers it as to vest in the donee the remainder after a life estate. The

remainderman's affairs shortly thereafter become involved and he is adjudicated bankrupt, so that the remainder is sold by the trustee in bankruptcy. The transferor eventually dies, leaving an estate insufficient to pay the tax computed on the then value of the property originally transferred. Although the remainderman has had no interest in this property for many years and has had no benefit from it except as the proceeds may have been used to pay a dividend to his creditors, he is, nevertheless, personally liable for a tax based on the value of the property at the date of the grantor's death, which may be greatly in excess of the value at the time of the transfer.

These and other illustrations which may readily be suggested amply warrant the characterization of the tax contained in the concurring opinion delivered by Judge Hand in *Frew* v. *Bowers*, 12 Fed. (2d) 625 (at p. 630):—

> "In substance it [*i.e.*, the Revenue Act of 1918] imposes a tax upon the settlor, measured by the value of property at his death, over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute

them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

As has already been pointed out, it necessarily follows from the Government's theory that if, as in *Levy* v. *Wardell*, 258 U. S. 542, the settlor leaves no estate whatever, there can be no tax. If, however, the settlor leaves an estate of trifling value, say $100, the donee is liable for a tax based upon the value at the date of the death of all the property originally transferred. If a tax which depends upon purely accidental circumstances of this nature is not "arbitrary and capricious," it is not easy to imagine one to which those words would apply.

The gist of the Government's argument is that the law simply provides a measure for the tax and that the measure is not unreasonable because it includes only property which has been disposed of in a quasi-testamentary way. On page 29 of the brief for the plaintiff in error it is said that "if, on the whole, the transaction has so resulted that it amounts substantially to a testamentary transfer, the value of the property affected is included in the measure of the tax." For the purposes of the case at bar it is unnecessary to determine just how far this theory may warrant the application of the statute to cases in which a life interest is retained by the transferor. In order to maintain its position as regards the present case, the Government must say that an irrevocable gift to A for the life of the transferor with remainder to A's heirs,—which is the effect of the trust indenture in the present case when taken in connection with the assignment,—is quasi-testamentary, although it is not pretended that a gift to A in fee, not made in contemplation of death, could be regarded as testamentary or that there would be any testamentary element in a gift to A for his own life with remainder to his heirs. If the Government is right, a trust for the benefit of A and his descend-

ants for fifty years, after which the property is to go to Harvard College, is quasi-testamentary, but the unreasonableness of any such assertion is apparent on its face. As applied to a situation like that now presented, the argument based upon the propriety of taxing quasi-testamentary gifts is, in short, wholly irrelevant.

It is accordingly submitted that the District Court was manifestly right in ruling that "if the Revenue Act of 1918, according to its true construction purports to authorize the exaction of the payment referred to in the first count of the declaration [*i. e.*, the exaction based upon the trust property], it is to that extent void, because not an exercise of any power granted to Congress by the Constitution of the United States" (R. 17, 28).

Upon any view of the case, the District Court was right in directing a verdict in favor of the executors for the full amount in controversy, so that the judgment should be affirmed.

ROBERT G. DODGE,
HAROLD S. DAVIS.

APPENDIX

Extracts from Revenue Act of 1918

Sec. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403 (*par.* 298–310), is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

* * * * *

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) to the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit

of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

* * * * *

SEC. 408. That if the tax herein imposed is not paid with 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover

from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

SEC. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

INDEX.

PAGE

TABLE OF CASES.

TEXT BOOKS CITED.

Supreme Court of the United States

October Term, 1926

No. 88

MALCOLM E. NICHOLS, Collector of Internal Revenue of the United States for the District of Massachusetts,

Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of Julia Coolidge,

Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF TYSON S. DINES, PETER H. HOLME, HAROLD D. ROBERTS, AND J. CHURCHILL OWEN, *AMICI CURIAE*, ON BEHALF OF MARY DEAN REED, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF VERNER ZENOLA REED, DECEASED.

Tyson S. Dines, Peter H. Holme, Harold D. Roberts and J. Churchill Owen, with consent of counsel for the parties above named, and after first having asked and obtained leave of Court, file this brief herein, and to show grounds for their special interest in the case at bar state the following facts:

STATEMENT

The writers of this brief represent Mary Dean Reed as sole executrix of the last will and testament of Verner Zevola Reed, her deceased husband, in a suit now pending in the Federal District Court for the District of Colorado and entitled *Reed v. Howbert*. By this suit Mrs. Reed seeks to recover from Howbert, United States Collector of Internal Revenue, the sum of approximately one million dollars, paid under protest as an additional estate tax levied under the Federal Estate Tax Law of 1918, in respect to the property in a *trust created in 1902*. Mr. Reed *died April 20, 1919*—a few months after the passage of the law.

The trust was irrevocable and provided for the payment of the income to the decedent for life with remainders to his descendants. The value of the property actually and absolutely transferred to the trust was at the time of transfer approximately two and a quarter million dollars. The value of the assets in the trust at the date of death and assessed as of that date was about four million dollars. Thus an incremented capital value of approximately one and three-quarter million dollars accruing to the corpus after its transfer to the trust and never owned or transferred by the donor of the trust was taxed as part of the decedent's estate. Furthermore, over a half million dollars worth of the assets in the trust at date of death were substitute assets resulting from reinvestments by the trustee. These had never been owned or transferred by the donor, but were taxed as a part of the estate.

The application of Section 402 (c) of the Revenue Act of 1918 to these facts—a gift made years prior to its enactment—has raised the question of the constitutionality of the retroactive provisions. This is one of the main

points involved in the case at bar, of *Nichols v. Coolidge*. In both cases there is the retroactive taxation of a transfer on the theory that it was intended to take effect at death. In both cases the rights were created prior to the passage of the Estate Tax Law. Although there are a few slight differences in the facts of the two cases, these differences are not material in the questions here to be discussed, as the general effect and result of the tax in both cases is the same. This is our justification for asking the court's and counsel's permission to intervene and file this brief *amici curiae*.

In the following pages we shall not contend that Congress has not power to levy an estate tax. That is settled. We shall not argue that Congress has no power to tax transfers intended to take effect in possession or enjoyment at death. That also is settled. The constitutional point raised by these cases is limited to the proposition that Congress cannot tax transfers intended to take effect in possession or enjoyment at death *when the transfers were completed prior to the passage of the taxing law*. The tax collected is not an inheritance tax, estate tax or tax on the passing of property at death, but is simply a tax on a past and completed gift. Thus analyzed we shall then proceed to show that these provisions impose a tax unconstitutional, first, as an unapportioned direct tax; second, as a deprivation of property without due process of law within the Fifth Amendment; and third, as a violation of the fundamental conceptions of free government. Finally we shall venture to suggest a possible way to clear these hurdles of unconstitutionality: that Section 402 (c) reasonably construed does not apply to transactions taking place prior to the 1916 Estate Tax Law.

ARGUMENT.

I.

THE NATURE OF THE FEDERAL ESTATE TAX ACT OF 1918 AS APPLIED TO TRANSACTIONS COMPLETED BEFORE THE LAW WAS ENACTED.

IN ITS ESSENCE IT IS A TAX UPON A PAST TRANSACTION—A TAX UPON A COMPLETED TRANSFER.

The Revenue Act of 1918 provides in part as follows:

> "Sec. 401. That * * * *a tax* equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed upon the transfer of the net estate* of every decedent dying after the passage of this Act * * *."
>
> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *;
>
> "(c) To the extent of any interest therein of which the decedent has at any time *made a transfer*, or with respect to which he has at any time *created a trust*, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*)."
>
> "Sec. 407. That the Executor shall pay the tax to the Collector * * *." That if there is an unpaid excess "Such excess shall be *a lien upon the* entire estate * * *."
>
> "Sec. 409. That unless the tax is sooner paid in full, it shall be a *lien* for ten years *upon the gross estate* of the decedent * * *."

"If (a) the decedent *makes a transfer* of, or *creates a trust* with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case *the tax in respect thereto* is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein *at the time of such transfer*, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax * * *." (Italics ours.)

The ultimate, the essential nature of the retroactive provisions of this tax, rather than the name by which the statute in its entirety goes, is the first important matter to be determined. This essential nature is to be ascertained by looking to the substance of the Act and to the effect of the Act when these retroactive features are applied to the transactions of the persons claimed to be within its scope. We believe that this Act retroactively applied is neither an estate tax, an inheritance tax, nor a death duty of any kind. It is either a tax on certain persons because they transferred property or created rights prior to the passage of the law, or a tax on past transactions. In either case it is a direct tax.

Congress said: "*A tax is hereby imposed upon the transfer of the net estate*" etc.

This is not a tax upon the *receipt* of anything by anybody. Congress did not approach the problem from the viewpoint of the recipient. The law looks at the entire

property of a man about to die and it says: Before you can finally pass on any interest in what is yours at the moment of death (or in some instances in what used to be yours), the Government must first be satisfied.

The thing sought to be taxed, "the net estate", is no isolated phrase shorn of a context, neither is it a theoretical or algebraic concept or other mathematical abstraction. It is always a direct derivative of the gross estate and what constitutes the gross estate the law makes clear, as well as what may be deducted therefrom. Every item that goes into the gross estate directly swells the resultant net estate. Congress did not intend to enforce a tax on a man's obligations, on the expense involved in the machinery of winding up his affairs after death. It did not see fit to tax the first $50,000.00, nor to tax property that had recently paid a government estate tax, nor to tax his public or charitable gifts. It therefore allowed certain deductions (Sec. 403).

Nevertheless, Congress included all his property in its definition of his gross estate, the value of which, item by item, the executor's report must state. Furthermore, when it dealt with the subject of payment of the tax, and was making sure that the Government should be protected, it did not limit the Government's lien to the net estate; it provided that the lien should be "upon the entire gross estate" (Sec. 407) or "upon the gross estate" (Sec. 409). So when the statute is read as a whole, as of course it must be, the thing obviously sought to be taxed and actually taxed is the passage or the transfer of property—call it the transfer of a value, or the transfer of the net estate, or what you will—*it is the transfer of property*, the thing of value that human beings are all seeking to get. That this is a tax on the transfer of the decedent's estate and primarily collectible from his estate as a whole seems obvious.

This meaning of the Act is made particularly clear in Sec. 409 where, in regard to enforcement of 402 (c), it is provided:

> "If the decedent *makes a transfer* of or *creates a trust* with respect to any property in contemplation of death or intended to take effect in possession or enjoyment at or after his death * * * and if in either case *the tax in respect thereto* is not paid when due, then the transferee, trustee * * * etc., shall be personally liable * * *."

There can be no possible ambiguity as to the meaning and correlation of these words. The *making* of *a transfer* or the *creation* of *a trust* are the acts sought to be taxed, and the tax is imposed *in respect thereto.*

Now apply this law, this tax upon the transfer of the net estate, to the facts of the Reed case, as they were taken for purposes of argument on demurrer. In 1902, seventeen years before the passage of the 1918 Estate tax law, Reed created a trust; he put certain property absolutely out of himself and into the trustee; he reserved no power to recall it; the transaction was complete; he had finally parted with title. When he made these gifts he was doing a legitimate thing. He was not evading. There was no occasion for the existence of an ulterior motive. The 1918 law was passed a few months before he died. It taxes his precedent transfers of these assets and makes his estate pay not 25% of their value when he parted with them—that would have been bad enough—but 25% of everything in the Trust based upon the values into which the assets had grown on the date of death. Values and assets are taxed which never at any time had been the decedent's.

Years before the 1918 law, in 1907, Mr. and Mrs. Coolidge joined together and transferred to trustees certain real and personal property, which was to be held ir-

revocably, the trustees agreeing to pay the income in certain proportions to them for life, remainder to survivor for life, remainder equally among their children. This was an out and out transfer; the trustees had full control. This was a perfectly legitimate act; no evasion was present. Then the 1918 law comes into being and taxes this past act of transferring property, and collects the tax from the executors and from the beneficiaries through an imposition based, not on the aggregate value of the property parted with, but on the value into which this property had grown at the time of the death.

Therefore, when we look, not to the name by which this whole tax law is called, but to the essential nature of the retroactive clauses when applied to transactions such as these, what can this law be but a tax on a past transfer of property, a past transaction, a completed gift?

The law plainly taxes the *transfer* of decedent's property. A common argument for the Government is that some kind of transfer took place at the decedent's death. This is clearly erroneous. Years before death the decedent had made an irrevocable transfer of the property to the trustee and it had ceased to be the decedent's property in any sense of the word. The transfer was complete and absolute the instant this property was placed in the trust and, when decedent died, no title whatsoever passed. It is true that in the Reed Case the beneficiaries of the trust actually began to get the income on the decedent's death, while in the case at bar the Coolidge beneficiaries had been receiving the income since 1917; but in each case the thing into the enjoyment of which the beneficiaries came was not the property of the decedent. All that the decedent had was a life interest which did not and could not pass at death because it ended the moment of death. Long before the decedent's death and before the passage of this tax law, the children had the ownership in this property subject to the life estate; and when death came

and the life estate was terminated, they simply came into the enjoyment of their own property rights. If John Doe had leased property to Mr. Reed for life, John Doe would come into the enjoyment of the property on Mr. Reed's death but it would be absurd to say that this amounted to a transfer from Mr. Reed to John Doe. Then, too, it is always to be borne in mind that the tax is not levied upon the fact of anyone's coming into enjoyment.

That no transfer took place at the decedent's death is particularly evident in the case at bar; for there, in 1917, one year before the tax law was passed and four years before her death, Mrs. Coolidge assigned all her life interest to the beneficiaries. This meant that at her death nothing passed from her; her death was simply the signal for the distribution of the corpus of the trust fund.

The absurdity is even more clearly illustrated by a case of a transfer made in contemplation of death.* If

*Foot Note: From time to time in this brief we shall refer to the tax on transfers in contemplation of death. Although such transactions differ from the type of transfer involved in the case at bar, they afford an additional test of the statute. The same sentence of the law links together transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death and these two types of transfer are treated in an identical manner throughout the statute. Since the statute must be given some consistent meaning applicable to all its parts, a resort to the illustration of a transfer in contemplation of death is justified as throwing light on the real nature of the tax in the case at bar.

Moreover, the "before and after" clause in section 402 (c) is a single clause applying equally to each of these types of transfer. If this clause is unconstitutional as to either type of transfer, it makes the law unconstitutional as to both types of transfer. Under well settled rules of law, there is no possible severability in the application of this "before and after" clause. It is unnecessary to elaborate this point because we do not need to argue the question of the invalidity of the tax on a past transfer in contemplation of death,—but, in order to show the court that our illustrations are applicable, we wish to point out that the invalidity of a retroactive tax on such a transfer would make the retroactive "before and after" clause invalid as applied in the case at bar.

in 1907 Mrs. Coolidge had made an absolute gift in contemplation of death, both the title and possession and enjoyment of the property would have passed at once and at her death absolutely nothing would have happened to the property. Nevertheless, the law would impose a tax on the transaction. Certainly this could not be a tax on the passing of the property at death.

The 1907 transfer is the only transfer from or by the decedent and the only transfer which could be taxed. That the transfer is the thing taxed is the view supported by the authorities.

The matter is well expressed in *Hunt v. Wicht*, 174 Calif. 205, 162 Pac. 639 (1917). That case involved a transfer intended to take effect at death. The decedent had made a deed of property to his wife, but had placed it in escrow for delivery to her on his death. By the California law, at the time when the deed was made, transfers intended to take effect at death were not taxable; when the death occurred, however, the law made such transfers taxable. In holding the tax unconstitutional, Chief Justice Angellotti said:

> "*The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate.* The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. *His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow.*" (Italics ours.)

Keeney v. New York, 222 U. S. 525, 56 L. Ed. 299 (1912), a case that doubtless will be cited by the Government, also forcibly illustrates this point. That case involved a transfer similar to the one in the case at bar. It does not involve this constitutional question because the law taxing the transfer was in effect *before* the transfer was made. But it does throw light upon the proposition that in truth the tax as applied to the facts in the Reed and Coolidge cases is a tax on *past transfers*. At the time of transfer decedent was a resident of New York, and the property was situated in New York. At the date of death, decedent was no longer a resident of New York, and the property was no longer situated in New York. New York collected a tax, on the theory that this was a transfer intended to take effect at death. Even though New York had no jurisdiction to collect a tax on property passing from a non-resident, this Court upheld the tax because New York had jurisdiction over the property at the date of the transfer.

Mr. Justice Lamar said (222 U. S. 537; 56 L. Ed. 305):

> "But the statute does not impose a tax on the property, but on the transfer. *The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made.* At that time the grantor was a resident of the state of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the state to fix the date and to say when and how the amount shall be ascertained and paid. The fact that the

> liability was imposed when the transfer was made, in 1903, and that payment was not required until the death of grantor, in 1907, does not present any Federal question." (Italics ours.)

The New York law involved in that case was similar to the Federal law involved in the case at bar. This holding of this Court conclusively shows that what is taxed is the original transfer and not a devolution of property at death.

The wording of the Federal Law itself makes this perfectly plain. The tax is based on property

> "of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or *after* his death."

If Mrs. Coolidge and all the other beneficiaries of the trust could have gone to the Trustee before this tax law was passed and revoked the trust, and could have had the Trustee give this property to some third person, then Mrs. Coolidge's death would have had no connection whatsoever with this property. Yet this statute would authorize the collection of this same tax. The same section of the statute applies to transfers which take effect *after* death. In the case of such a transfer, nothing passes at death—the original transfer is the only thing which could be the object of the tax.

The plain, simple truth is that this property did not pass from Mrs. Coolidge on her death, and that this law does not even purport to tax what passed at Mrs. Coolidge's death. *The tax is on the transfer into the trust.* The only connection whatsoever between this tax and death is that death is used to describe the type of transfer which is taxed, and that death fixed the time for the payment of the tax.

It may be well to point out here that there was nothing testamentary about this transfer. It was irrevocable and not ambulatory. In the case of a revocable trust, the creator may change the situation at any moment up to his death just as he may change his will. In such a case, there is in a sense a transfer at death. In the present case where the trust was irrevocable, it is the very opposite of "testamentary" and there is no transfer at death under any conceivable theory.

In defending the numerous suits brought by taxpayers to recover taxes assessed under the 1916 estate tax law, as well as under the 1918 law, counsel for the Government have resorted to various theories as to the real nature of these statutes. It is obvious in their statement of these theories that they have sought to avoid the admission that either of these statutes was retroactive in the full sense, the brazen sense of the word. They have tried to show that even though reaching back into the past, there was still some act, some occurence in the instant case, taking place subsequently to the enactment, that would give the law a prospective operation. This is a commendable attitude on the part of Counsel, for it is inherently offensive to any right thinking person, to any lover of fair play, to hold a man to the consequences of his act when the consequences were unforseeable and came about as consequences only because of the later enactment of a law.

We believe that there is but one tenable theory as to the nature of this tax when applied to a case in which the trust was created or the gift made before the date of passage of the Act and that is that it is *a tax on the past completed transfer or gift.* We deem this to have been absolutely and finally determined by *Shwab v. Doyle*, 258 U. S. 529 (1921), and the group of cases decided therewith, and by the case of *Lewellyn v. Frick*, 268 U. S. 238 (1925).

If the Supreme Court in any of those cases could have found another theory upon which to hang the tax, there would have been no occasion for any consideration or discussion of the question of retroactivety; the question of whether Congress intended to tax past acts or transfers would not have been present. A contrary conclusion sustaining the tax would therefore have been reached in each of those cases. In short in *Shwab v. Doyle* and in *Lewellyn v. Frick* this Court has killed all other theories. The *Shwab v. Doyle* group of cases and the late case of *Lewellyn v. Frick* are particularly conclusive on this point because they involved substantially every sort of case that could arise under the sub-paragraphs of Section 402 and its predecessor in the 1916 law.

While we believe there is but one tenable theory as to the nature of this tax retroactively applied, namely that it is *a tax on a past completed transfer*, nevertheless, before proceeding to a discussion of the constitutional questions, we feel it desirable briefly to consider certain other theories which, from time to time, have been advanced and which we deem unsound. Thus we hope to leave unquestionable our premise as to the true nature of the tax.

(A) THE COMING INTO POSSESSION THEORY OF THE NATURE OF THE TAX.

According to this theory the Government asserts that this is not a tax on a past transfer, but a tax on the present privilege of coming into possession, and hence that the act does not really affect past transactions. Stated somewhat differently, the theory is that the tax is on the right of the remaindermen to come into possession of their remainders.

The answer to this theory is manifold:

First, the law expressly purports to be a tax on a transfer, not on the privilege of receiving.

Second, the decision of the courts show that it is a tax upon a transfer.

In *Curley v. Tait*, 276 Fed. 840 (1921), at page 844, the Court said in a case involving the 1916 law:

> "The present act, unlike its federal predecessor, is an estate tax, and *not a tax upon the right to receive*. If the Government's contention be sustained, the tax will come, not as in *Wright v. Blakeslee*, *supra*, or in *Cahen v. Brewster*, 202 U. S. 543, * * * out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not." (Italics ours.)

This Court in *Shaw v. Bright*, *supra*, must have deemed the 1916 law to impose a tax on the transfer because by denying it a retroactive effect it held that it could not reach the past transfer. If this Court had regarded it as a tax upon the coming into possession it would have reached a contrary conclusion as to the taxpayer's right to recover in that case.

Again in *Edwards v. Slocum*, 264 U. S. 61, decided in January of 1924, this Court through Mr. Justice Holmes said at page 62 in speaking of this estate tax law of 1916:

> "But this is not a tax upon a receiver; it is a tax upon a *transfer* of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton v. Moore*, * * *. It comes into existence before, and is independent

of, the receipt of the property by the legatee." (Italics ours.)

See also *F. M. C. A. v. Davis*, 264 U. S. 47 (1924).

A third phase of the answer to the coming into possession theory is that it is inconsistent with the taxing of transfers in contemplation of death, as well as of gifts to take effect in possession *after* death. In the same sentence of paragraph (c) of Section 402, gifts in contemplation of death as well as gifts intended to take effect in possession or enjoyment *at* or *after* death, are dealt with and so dealt with as to be placed on a parity.

If a man expressly makes a gift in contemplation of death a week before he dies, there is no coming into possession when he dies—that occurrence has already taken place, and if the law does not tax the transfer, there is nothing for it to tax. Furthermore, the tax could be successfully evaded today if expressly in contemplation of death a man parted with all of his property just before he died. No one would come into possession at or after his death and no tax would be assessable. Suppose an estate consisted of only two items: One a gift in contemplation of death, the other of equal value, being a gift to take effect at death. We submit that it would be utterly at variance with the structure of this statute to select the first item and say as to it that the tax was on the transfer, but as to the second item it was a tax on the coming into possession. This would be to adopt two different theories as to the nature of the tax according as it were to be applied to one or the other of two types of gift embraced in the same sentence of the statute and obviously treated alike.

In reporting on the Federal Estate Tax of 1916 the committee on Ways and Means said (Report No. 922, 64th Congress, First Session):

"Your Committee deemed it advisable to recommend a Federal Estate Tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees."

In addition to all these reasons for holding the tax to be in its nature a tax upon the transfer and not upon the coming into possession, we suggest that the very method of taxation under which the estate, rather than the legatee or remainderman, pays the tax is more than significant. The rate of the tax and its amount are based not on what is received, but on what is transmitted. Even in the case of transfers intended to take effect at or after death, or transfers made in contemplation of death, the burden of the tax falls, not upon the transferee, but upon the residuary estate (except where the assets of the estate are not sufficient to pay the tax).

Farmers Loan & Trust Co. v. Winthrop, 238 N. Y. 488, 144 N. E. 686; certiorari denied 45 Sup. Ct. 225 (1925).

Bemis v. Converse, 246 Mass. 131; 140 N. E. 686 (1924).

Pratt v. Bean, 246 Mass. 380, 140 N. E. 924 (1924).

The date of coming into possession does not necessarily fix or have any relation to the date of paying the tax. If the decedent has made a gift to take effect twenty years *after* his death, the tax will be payable at his death, or twenty years before there is any coming into possession. If the property be lost, stolen or destroyed in the interval the donee never will come into possession.

Even if this could be construed to be a tax on the right to come into possession of a remainder where the property rights are already vested in those taking pos-

session, the tax would be a direct tax and unconstitutional because not apportioned, as argued elsewhere in this brief.

Dawson v. Kentucky Distilleries, 255 U. S. 288 (1921).

Matter of Pell, 60 App. Div. 286; affirmed 171 N. Y. 49 (1902).

Craig v. Taylor & Sons, 192 Ky. 36, 232 S. W. 395 (1921).

Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 (1916).

Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916).

(B) THE UNCOMPLETED TRANSFER THEORY OF THE NATURE OF THE TAX.

According to this theory, transactions such as took place in 1907 in the Coolidge case and in 1902 in the Reed case are sought to be viewed as not really complete until death made them so; and that as this event occurred after the law was passed the law is not truly retroactive.

One fatal defect in this theory is that it fails to cover the case of gifts in contemplation of death, and is absolutely inconsistent with the attempt to tax them as pointed in our argument, *supra*. Again two distinct theories of the tax would have to be resorted to in applying Sec. 402 (c) according as the Department might be dealing with one sort of gift or the other.

When the property was transferred to the trust in 1907, the owner had performed her last act in respect to it and nothing she could say or do thereafter could change what she had done. It is true the date of full possession and enjoyment on the part of her children was postponed

until her death; but to press that point forces the government back into the coming into possession theory already discussed. So far as Mrs. Coolidge's or Mr. Reed's rights were concerned, the transfer was irrevocable, indefeasible and complete and its terms were fixed when it was made. It must always be borne in mind that the whole scheme of this law was developed from the end of the transaction opposite to that which forms the basis of the usual state inheritance tax laws. It is the "whence" rather than the "whither" which must be considered.

In holding unconstitutional a similar law, the New York Court said in *In re Webber*, 151 App. Div. 539 at 541:

> "The deed became operative immediately upon its delivery with the intention of vesting title in the trustees for the purposes of the trust, which provided for the final distribution of the property, and only the benefits were postponed to the happening of a particular event, and the law of that contract must be determined by the law as it existed when the deed became effective."

This uncompleted transfer theory is obviously but another effort to get away from the obnoxious retroactive tax—it is an effort to fasten upon something occurring *after* the passage of the law as the basis for the imposition.

(C) THE MEASUREMENT THEORY OF THE NATURE OF THE TAX.

This theory may be stated in several ways, but all are variations on the same theme. One possible statement of this theory is that past transfers *inter vivos* may properly be included in the computation of the tax as a measure of the tax even though the thing taxed is only the transfer of property owned at the time of death.

This theory would permit, without taxation, the transfer of an entire estate in contemplation of death; because, while the measure would exist, the matter to be taxed, i. e., the transfer of *things owned at death*, would not No tax could be collected in those cases where the decedent dies without leaving any estate, as in *Levy v. Wardell*, 258 U. S. 542 (1921). Congress certainly never intended any such result as that.

Furthermore, this theory would here result in a tax on A's property measured by the value of B's property and thus fall within the inhibition recognized in *Knowlton v. Moore*, 178 U. S. 41, and so conclusively illustrated in the hypothetical case set out by Mr. Justice White at page 76 (quoted *infra*).

Another statement of the same theory is that the "net estate", the *value* of which determines or measures the tax, includes everything taxable under the act; but that the "net estate", the *transfer* of which is taxed, includes only property which was actually possessed by decedent at his death.

Sec. 401 of the Act provides:

> "A tax equal to the sum of the following percentages of the value of the *net estate* (determined as provided in Section 403) is hereby imposed upon the transfer of the *net estate* of every decedent" * * *. (Italics ours.)

In other words, this theory requires that the phrase "net estate" shall have two different meanings in the same section and sentence of the law; that "net estate", as it first appears in Section 401, and the *value* of which is to measure the tax, shall be different from "net estate", used in the next line of the same sentence, the *transfer* of which is taxed. There is no ground for believing that Congress intended different meanings for these two iden-

tical phrases. Under the well settled rule of construction they should be given the same meaning.

The scheme of the Act inherently shows that the past transfers themselves are taxed and that they do not serve merely as the measure of a tax on something else. As indicated earlier in this argument the tax in certain events may be collected from the transferee or trustee personally or out of the actual property transferred. See Sec. 409. Neither one of these possibilities is consistent with the theory that the past transfers are merely measuring rods. They are the substance, not the shadow.

Sec. 409 provides:

> "If (a) the decedent makes a transfer of, or creates a trust with respect to any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * and if in either case *the tax in respect thereto* is not paid when due then the transferee * * * shall be personally liable," etc. (Italics ours.)

The measurement theory would make these words meaningless. The tax is on and in respect to these transfers as definitely as words can place it there.

The Government in its District Court brief in the *Coolidge* case, stated that this tax "is imposed not upon a transfer of property but upon the transfer of the 'net estate' which under the statutory definition is not property, but is merely a value", and that "The tax is measured not by the *transfer* of property but by the *value of property*". This sounds like a play on words.

In the Reed case the Executrix reported on all the property of the testator, but excluded that covered by this trust. The usual deductions were subtracted and the tax paid on the net estate. Later the Commissioner valued the assets of the trust as of the date of death and collected a

tax of 25% on the total valuation. The amount of the tax in dispute was imposed upon, and arose solely from the value of these trust assets included as a part of decedent's net estate. Call this additional tax what you may; a tax on the net estate, a tax on "a value", a tax on an occasion, a tax on the "cessation of an interest"—the fact is that all of the assets included in the past gift were appraised and 25% of that appraised value had to be paid by the Executrix and if she had had nothing with which to pay it, the trustee and the beneficiaries would have been held personally liable for it.

Counsel for the Government in some of these cases have contended that this is "*a tax on a present occasion* measured by some past events"; "a tax generated by the decedent's death".

If Congress intended this to be a tax on a "present occasion", viz., a tax *on death*, why did Congress use the expression "A tax * * * is hereby imposed *upon the transfer of the net estate* of every decedent dying after the passage of this Act"? How could language be more aptly chosen to express the intent to tax the *transfer of property?* This is not a tax on the privilege or the fact of dying measured by the decedent's past life and conduct. If Congress had meant that, it could easily have said so. The resort to a fanciful, hairsplitting, contrary-to-fact argument carries with it its own refutation.

Even if the law could be construed in accordance with the measurement theory, it would be unconstitutional. No amount of subtle reasoning can obscure the plain fact that this is in truth a tax in respect to a past gift and not merely a tax on something else but measured thereby. It is well settled that a valid excise tax on one thing cannot be measured by the value of some other thing which cannot be taxed. *Knowlton v. Moore, supra; Wallace v.*

Hines, 253 U. S. 66 (1919); *Delaware L. & W. Ry. Co. v. Pennsylvania*, 198 U. S. 341 (1904); *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217 (1907); *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1909).

Our position is not in conflict with *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911). There the tax was expressly upon the privilege of doing business, not upon income. The privilege was measured by the income of the corporation. This was upheld even though a part of such income would have been exempt from ordinary taxation. The decision was rested expressly on the ground that this was in substance as well as form, a tax not on the income, but on the true value of the privilege of doing business. The total income, including that from exempt sources was held a true and reasonable measure of the value of the privilege taxed. In *Maxwell v. Bugbee*, 250 U. S. 525 (1918), the New Jersey Inheritance Tax Law was upheld even though the rate of tax was made to depend upon all of the property of the decedent whether within the taxing jurisdiction of the state or not. Extraterritorial, nontaxable property was not *taxed* in that case, although the *rate* of tax in New Jersey was fixed by a wholly reasonable standard which incidentally included nontaxable property. But even the property considered in determining the rate of tax was property all belonging to the decedent at his death, and there was no intimation that property *previously disposed of* and belonging to another person could be considered for any purpose.

According to the measurement theory, the tax in the present case is a tax on A's estate measured by B's property. In other words, it is a tax on B's property collected from A. There is absolutely no authority even suggesting that such an exaction would be valid.

(D) THEORIES THAT THE TAX IS ON THE PASSING OF PROPERTY AT DEATH OR ON THE CESSATION OF AN INTEREST.

In endeavoring to arrive at the true nature of this tax—what it really is—as applied to the facts of the Coolidge or Reed case, it may be helpful to point out one or two more things which it is not. When retroactively applied, *it is not a tax upon the passing of property at or after death.* In the case of the gifts to the trust prior to 1916, in the Reed case the property did not pass from the decedent on his death. Upon the transfer made irrevocably several years before, the property had ceased to be Reed's. When he died no title passed from him. What the beneficiaries got was not his life estate, nor his property. Long before Mr. Reed's death his children had the ownership in this property, subject to his life estate, and when he died and his life estate ended, they merely came into the enjoyment of their own property.

We should like to quote again from *Hunt v. Wicht*, 174 Calif. 205, involving a transfer to take effect at death. In holding unconstitutional a subsequent tax on the transfer the Court said (p. 209):

> "The succession to the property by the grantee * * * was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate * * * His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death * * *."

See *In re Webber, supra.*

The impropriety of holding that this law taxes any succession at death is apparent if we consider what would have been the case if in 1907 Mrs. Coolidge had made an absolute *gift in contemplation of death.* Both the title and possession and enjoyment would have passed at once;

at her death absolutely nothing would have happened and yet under the 1918 law a tax would have been levied. We submit this clearly shows that the tax cannot be a tax on the passing of property at death. If no property passes there is nothing on which to levy a tax.

In *Knowlton v. Moore*, 178 U. S. page 78, speaking of death duties, the Court said:

> "Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

In *Wardell v. Blum*, 276 Fed. 226 (1921), the Circuit Court of Appeals of the Ninth Circuit, in holding that a wife's share in community property was not taxable as a part of her husband's estate under the Federal Law, said at page 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased', from which the conclusion is inevitable that the property upon which such a tax is imposed must, in truth, be the property of the deceased."

The law does not say anything about property passing at death. The tax is on the transfer into this trust. The only connection whatever between this tax and death is that death is used to describe the type of transfer which is taxed, and that death fixes the time for the payment of the tax.

Again in neither the Coolidge nor the Reed case can it be a tax upon the "*cessation of an interest*" at death. Mrs. Coolidge had no interest in the trust which ceased at death. Mr. Reed had a life interest in the income of an irrevocable trust created in 1902. It was his life interest, and this alone, that ceased at death. What was that in-

terest worth at the moment of death? What was its fair market value? Obviously nothing. May a million dollar tax be collected on the cessation of an interest worth nothing? But counsel may say his interest was in the whole trust and the whole trust was worth four million dollars. If the fact of having any interest draws into the estate the whole source of this interest we come to this absurdity:

Suppose Reed's interest, instead of being a right during his life to all the income, had been a right to one per cent of all the income for life. Could it then be contended that the value of the entire trust must be taxed when that meagre life estate ceased. Could it be reasonably contended that the same interest would have ceased in the supposed case of the right to one per cent of the income, as would have ceased if Reed had owned the four million dollars worth of assets unaffected by any trust? Obviously no. If the interest which ceased on the day of his death, be valued as of that moment when *ex hypothesi* his expectancy was nothing, it must be found to be valueless. Then on what reasonable theory can it be taxed as though it were worth $4,000,000? We submit that on these facts the tax cannot be deemed to be a tax on the cessation of an interest.

After having considered the coming into possession theory, the uncompleted transfer theory, the measurement theory and the theories that the tax is on the passing of property at death or on the cessation of an interest, each of which does violence to the plain meaning of the words of the Act and fails to meet consistently the various calls of the statute, we submit that the law in reality compels the taxing of a past transfer—a past transaction. The group of cases considered by this Court with *Shwab v. Doyle, supra*, dealt with a variety of past transactions and in each instance held in substance that the *1916* law properly construed did *not* reach those transactions completed

before its enactment; thus rejecting all these theories that a prospective occurrence was being taxed. When the 1918 Act is applied to a state of facts like those in the Coolidge case the statute necessarily raises the constitutional question. Congress in this instance has passed a statute expressly on the theory of retroactive taxation. Is it constitutional?

II.

THE FEDERAL ESTATE TAX ACT IN TAXING GIFTS MADE BEFORE ITS ADOPTION IS UNCONSTITUTIONAL.

(A) IT IS AN UNAPPORTIONED DIRECT TAX.

The United States Constitution provides, Article 1, Section 2, Clause 3:

> "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, * * *."

And in Article 1, Section 9, Clause 4:

> "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

As said by the United States Supreme Court in *Eisner v. Macomber* at 252 U. S. 189, 206 (1920), in speaking of the 16th amendment:

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an

> apportionment according to population for direct taxes upon property, real and personal. *This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.*" (Italics ours.)

Since the tax under consideration in this case was not apportioned according to population, it is clearly unconstitutional if it is a direct tax.

We propose to give no long review of the various decisions of the Supreme Court dealing with the question of direct as distinguished from indirect taxes. We believe that no complete and all-inclusive definition of the distinction has ever been framed. We doubt if any ever can be framed until the scope of the legislator's ingenuity in devising tax laws can be defined and classified and the infinitude of combinations into which man's business transactions may fall be accurately known.

We believe, however, that the greatest existing treatise on the subject is found in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895), and that all the learning that went before, may, after it went into that crucible, be passed over and the conclusions of that case be taken as at least the new starting place for discussion.

We submit that the mere difficulty of making a scientific distinction between direct and indirect taxes is not controlling. In the very nature of the situation the definition must develop as new tax laws and new sets of fact come before the Courts for consideration. A reading of the decisions of this Court shows that in a cloudy and obscure realm, a line of demarcation has gradually been worn. On the one side fall the cases of direct taxation, on the other those of indirect taxation. That a distinction exists and that the framers of the Constitution in

tended the two different classes to be differently dealt with and to be subject to different limitations must be granted.

We believe that the following is the most complete definition of the distinction to be derived from the cases up to this time:

When a tax is absolute and inevitable, it is direct; when it is not absolute or inevitable, it is indirect. When the tax is imposed regardless of any act or failure to act on the taxpayer's part, it is direct; when it is imposed because the taxpayer's voluntary act or failure to act brings him within the terms of the law, it is indirect. In other words, when a man has the power so to arrange his transactions through the exercise of his own volition, as to bring them within or keep them without the taxable realm as covered by a given statute, that statute must be classified as one imposing an indirect tax. But when the creation or the bringing into being of the taxable status could not be avoided by the taxpayer, the tax is direct.

In the Pollock case, reported in 157 U. S., Chief Justice Fuller, at page 556, says:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes." (Italics ours.)

On the rehearing of the case, the Chief Justice, as reported in 158 U. S. at page 637, said:

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the Government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, *although imposed merely because of ownership and with no possible means of escape from payment*, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of the framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself." (Italics ours.)

In *South Carolina v. U. S.*, 39 Court of Claims, 257, it is said:

"A tax is obligatory; from it there is no escape. *An excise is voluntary; the purchaser who would pay it cannot be compelled to purchase.*" (Affirmed in 199 U. S. 437 (1905).) (Italics ours.)

In *Thomas v. U. S.*, 192 U. S. 363 (1904), the Supreme Court has held valid a stamp duty on sales of corporate stock squarely on the ground that there was no absolute and unavoidable demand. Mr. Chief Justice Fuller said at page 371:

"The stamp duty is contingent on the happening of the event of sale, *and the element of absolute and unavoidable demand is lacking.* As such it

falls, as stamp taxes ordinarily do, within the second class of the forms of taxation." (Italics ours.)

In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911), this same test was applied in passing upon the validity of the Federal Excise tax on corporations. Mr. Justice Day said for the Court at page 151:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organizations; or when applied to insurance companies, for doing the business of such companies. As was said in the Thomas case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of privileges, and *the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.*" (Italics ours.)

It may be helpful to give a moment's consideration to the *capitation* tax, expressly classified by the Constitution as a direct tax. What is it which makes a capitation tax a direct tax? Clearly it must be something in the nature of the tax, and not the mere fact that it is an isolated type of taxation included within direct taxation merely by an arbitrary classification. The essence of the capitation tax is the fact that it is a tax upon persons. Clearly the direct character of the tax is not changed by the fact that it may be limited to a certain class of persons, such as citizens of the United States or male citizens over twenty-one years of age. All will agree that such a tax is a direct tax. Suppose the class of persons taxed to be narrowed down to include only bachelors. Could any one doubt that this would be a direct tax? Or, suppose the tax were applied only to persons who had theretofore been mar-

ried. This tax on a certain class of persons would be just as direct as any other capitation tax. In fact, a tax upon any class of persons classified according to their condition at the date of enactment of the tax law, or according to their past conditions or past actions, could be no different in principle. The same characteristic which makes the ordinary capitation tax a direct tax brings any unavoidable tax upon any determinable group of persons within the same category. This characteristic is the absolute and unavoidable demand.

When a past act is taxed, the taxpayer has no choice but to pay it. When the 1918 law was passed, Mr. Reed, Mrs. Coolidge and all other persons who had made similar contracts or transfers in the past were made absolutely liable for the tax. Nothing they could have done or refrained from doing after they knew of this law would have altered their tax liability. They had given away their property in a certain way and they had to die. The tax bore directly on the persons of these transferors because no matter what happened or failed to happen after the passage of the law, the liability remained unaltered. When a law taxes all persons who have done certain acts in the past, the tax is not on the happening of any event, but is essentially a tax on a class of persons—persons classified by their past actions; and utterly unlike a tax on persons who *shall* import or *shall* manufacture or sell goods in the future. If this tax be indirect then a tax on all persons who obtained a divorce in the past or who had red hair in the past might be levied as an indirect tax. So considered the tax here is obviously more of a capitation than a privilege tax, for if there ever had been a privilege, it had long since been exercised and was nonexistent when the Statute was passed. The fact that payment of the tax is postponed until death in no way alters the direct nature of the tax. The liability attached *directly* by the passage of the law and *not indirectly* by

reason of some future act or event. The future event of death was certain and unavoidable and merely fixed the pay-day.

A tax on lands is a direct tax. A tax on the income from land is a direct tax; so is a tax on personal property or the income therefrom. A tax on property because of ownership is a property tax, a direct tax. Likewise, a tax on the exercise of an essential element of ownership is a property tax.

In *McNeir v. Anderson*, 10 F. (2nd) 813 (D. C. N. Y. 2-15-26), the 1924 Gift Tax was held to be unconstitutional as a direct tax unapportioned. At page 815, Judge Augustus Hand said:

> "* * * I cannot see how this tax can be defended, which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property, which has not been apportioned, * * *."

In *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288 (1921), a Kentucky statute taxing all liquor withdrawn from bond was involved. In holding the tax to be a property tax, Mr. Justice Brandeis for the Court said at page 294:

> "In fact, the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the state. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower Court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable; i. e., consumption, sale, or keeping for

future consumption or sale * * *. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' *To levy a tax by reason of ownership of property is to tax the property.*" (Italics ours.)

In *Craig v. Taylor & Sons*, 192 Ky. 36, 232 S. W. 395 (1921), the Supreme Court of Kentucky says (p. 39):

> "The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

In *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916), the Court says (p. 167):

> "A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. * * * No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916), involved a statute taxing the extraction of turpentine from any trees in the state. The Supreme Court of Mississippi held that this was a property tax, saying (73 So. 194):

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to

pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In *Eisner v. Macomber*, 252 U. S. 189 (1920), the Supreme Court held that the tax on stock dividends was a direct tax not protected by the Sixteenth Amendment because stock dividends, whatever Congress might label them, in their essence are not income. A tax thereon is a tax on past accumulations which cannot be an income tax, cannot be a privilege tax, but is a direct tax.

A consideration of a decision rendered by the Supreme Court prior to that of *Eisner v. Macomber* will possibly make the significance of the *Macomber* case more obvious.

In *Towne v. Eisner*, 245 U. S. 418 (1917), the Supreme Court held that the 1913 Revenue Act, which provided that net income should include "dividends" and also "gains or profits and income derived from any source whatever", did not as a matter of construction attempt to tax a stock dividend made in 1914 against surplus earned prior to January 1, 1913.

Seeking to cover the subject of stock dividends, Congress, in the Revenue Act of 1916, and after the *Towne* decision, expressly declared that "a stock dividend shall be considered income". Congress thus sought to bring stock dividends within the scope of the Sixteenth Amendment. The *Macomber* case in effect decided that Congress could not make white black by legislative fiat; that Congress could not widen the scope of a constitutional amendment by the device of a legislative declaration or definition; and that calling a thing "income", which was really something else, could not blind the eyes of the court to the reality. In reaching its conclusion, the fact that this definition as to stock dividends was included in a section of the statute dealing with items which in truth consti-

tuted income, did not prevent the court from segregating this definition and determining its true character. The context in which the definition stood and the company which it kept failed to give this definition a character which it did not deserve.

In the case at bar, Section 402 (c) of the Statute, which would be appropriate and free from objection as an estate tax if prospectively applied, absolutely loses its character as an estate tax and as an excise tax when retrospectively applied. Consequently, under the reasoning of the *Macomber* case, the court will seek out the true, the real nature of this section when applied to past transactions and will not be misled by the fact that this section is associated with valid excise features or by the fact that it is part of a statute which goes by the name of an estate tax.

In the *Macomber* case, the Supreme Court answered the Government's argument that the tax was indirect as follows (252 U. S. at page 217):

> "* * * the Government, * * * virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916, the tax is imposed not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits became manifest through the stock dividend. If so construed, would the act be constitutional?
>
> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the

company, including its accumulated and undivided profits, is equally clear. *But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution is settled beyond peradventure by previous decisions of this Court.*" (Italics ours.)

Differently expressed, counsel for the Government in that case in effect argued that the previous accumulating of profits by a corporation for the benefit of its stockholders was a taxable occasion or act and that it was appropriate for Congress to make the tax, so levied, payable when those accumulated profits became manifest through the declaration of a stock dividend. After realizing the futility of contending that a stockholder receiving a stock dividend thereby got income, counsel for the Government in that case sought to defend the tax as an excise or indirect tax, on the only other possible occasion for the tax, viz., the past act of accumulating. That act was seized upon by government counsel, but the court decided that a tax on the past act of accumulating was a direct tax.

This holding is directly applicable to the case at bar. If, as the *Macomber* case holds, a tax upon the past act of accumulating profits prior to the enactment of the taxing law is a direct tax, it follows in the case at bar that a tax upon a transfer of property prior to the date of the law is also a direct tax.

In *Knowlton v. Moore*, 178 U. S. 41, 47 (1900), Chief Justice White quoted with approval the following French definition:

> "Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights; indirect taxes are levied upon the happening of an event or an exchange."

Whatever may be said in favor of a tax upon a future optional disposal of one's property in a given way, it is a vastly different thing to tax the value of property disposed of *inter-vivos* in the past, simply because it was so disposed of. In the latter case, it is a tax on an essential attribute of property and therefore a tax on the property itself. If this be constitutional, why may not Congress place a tax on every one of us in respect of every house ever owned and lived in by any of us in the past?

In the case at bar, the tax was on a past transfer of the property. Certainly the right of disposition is one of the most fundamental rights of ownership and is the right which gives property its value. If a man could not dispose of his property in any way, his property would not be worth much. If a man were taxed for making any kind of disposition of his property, it would in substance be a tax on his property. This Court has recognized this in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878), where it was held that a tax imposed by a Pennsylvania statute on the amount of sales made by an auctioneer was a tax on the property sold.

In *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786 (1899), a Federal law, taxing sales made at Boards of Trade or Exchanges, was held valid on the ground that the tax was on the privilege of using the special facilities for making sales. The court expressly recognized that a tax on all sales of property would be a property tax. In delivering the opinion, Mr. Justice Peckham said at page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

Under the holding of the above case, it is clear that a tax on all sales or transfers of property would be a direct property tax. A tax on future transfers similar to the transfer in this case would not be a property tax because the tax would be limited to a particular type of transaction. But when a past disposition of property, which was lawful and non-taxable when made, is the subject of the tax, the tax is not on any privilege but is a tax on the property, or, what amounts to the same thing, is a tax on the past act of exercising the right of ownership.

This all sounds rather technical but is really a simple matter of plain common sense. Congress cannot tax us simply because we own property or because we owned property several years ago. Now if Congress tries to tax us because at some time in the past we had walked into our own front door or had sold our property or had given it away, Congress would simply be using a roundabout way to tax the property. If this sort of tax were upheld, Congress could place a tax on all property ever owned or used in the past and could do the very thing which is forbidden by two different provisions of the Constitution.

We do not believe that under the guise of taxing a privilege, where the privilege is non-existent because exercised before the law was passed, Congress may evade the constitutional provisions. In the *Child Labor Tax case*, 259 U. S. 20 (1922), this Court refused to permit Congress under the guise of the taxing power to regulate the internal affairs of a state.

In the Pollock case, *supra*, at page 581, the Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and repre-

sentation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has indeed been established by repeated decisions of this Court."

In *Dawson v. Kentucky Distilleries Co., supra*, at page 292, Mr. Justice Brandeis said:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

As said in *Kansas City Ry. Co. v. Botkin*, 240 U. S. 227, 235 (1916):

> "A tax may be in form a privilege tax and yet, in substance, may be a tax on property."

Unless the Government shall go counter to the principle that the substance and not the form is controlling, it may not brush aside the conclusion that the retroactive provisions of the 1918 Act impose a direct tax, by announcing that generically and historically death duties are and have always been regarded as indirect taxes and that therefore the tax under consideration is an indirect tax, and then cite *Knoulton v. Moore*, 178 U. S. 41 (1900), and *N. Y. Trust Company v. Eisner*, 256 U. S. 345 (1921), as authority.

The truth is, in our view, that the retroactive provisions of this law do not properly belong in a death duty statute at all. These provisions impose no death duties; they have nothing to do with death, except as death fixes a date for collection.

In the *Knoulton* case and in the *Trust Co. v. Eisner* case no question of retroactivity was present. *The language used in those cases had to do with prospective situations.*

The tax in neither of those cases was inevitable, as in the present case. In each case the taxpayers' volition had a chance to operate. In the *Eisner* case, last above, this fact is brought out by the observation of Mr. Justice Holmes as to the testator. He says at page 349, "He (the testator) knows the law and the consequences of the disposition that he makes." Again in the *Frick* case *(supra)*, at page 251, this Court said that the tax "would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways". These, we submit, constitute vital differences between those cases and the present case.

In the case at bar we have an absolutely inevitable tax. The 1918 law was not in existence when this trust was created. The situation was beyond recall years before the law was passed. The decedent did not know the 1918 Estate Tax Law because when she consummated her contract there was no estate tax law of any sort to be known. She neither knew nor could know either the law or "the consequences of the disposition" that she made.

We are here suggesting no departure from the doctrine of *stare decisis*. We do not believe any decisions of any Court of last resort have ever held constitutional a law similar to the retroactive provisions of this law. But we submit that regardless of how often other phases of this or any other similar statute may have been held to be constitutional, if a new state of facts be presented showing that the particular clause of the statute here under consideration may result in the infringement of a constitutional right of the latest litigant, the question must be examined in the light of the novel facts, and the constitutionality of the statute as applied to this situation determined.

Such cases as *Brushaber v. Union Pacific Ry. Co.*, 240 U. S. 1 (1915), upholding the validity of income tax

laws which are partly retroactive, are not authority for retroactive so-called *excise* taxes. Under the Sixteenth Amendment, Congress has power to levy income taxes, without apportionment, regardless of the fact of their being direct. *An income tax is the only direct tax which need not be apportioned.* We are not concerned here with the question of whether *permissible direct taxes*, viz., income taxes, may also be retroactive.

We have been considering the tax as one collected from the estate. Suppose a case where the estate is insufficient and collection is made from the beneficiary. In so far as the tax is collected from the beneficiary of life insurance or of a gift, it is clearly a direct tax. It has been expressly held that a tax on taking possession of one's own property is a direct tax; *Dawson v. Kentucky Distilleries Co., supra; Craig v. Taylor & Sons, supra; Thompson v. Kreutzer, supra; Thompson v. McLeod, supra.*

The celebrated New York case, *Matter of Pell*, discussed *infra*, is a convincing authority on this point.

In re Craig's Estate, 97 App. Div. 289, 89 N. Y. S. 971 (1904) (Affd. 181 N. Y. 551), involved a trust almost identical with the Reed trust. In holding the N. Y. statute taxing this trust unconstitutional, the Court said at page 296:

> "When the right is conferred by a lawfully executed grant or contract it is *property*, and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

If a tax on the privilege of taking possession of property already owned is a direct tax, *a fortiori*, a tax on the estate of a decedent who exercises no privilege at all in connection with the property is a direct tax.

If this tax on past transfers is valid, Congress can in effect levy a direct tax without apportionment on any and all property in this country simply by putting it in the form of a retroactive excise tax. For example, Congress could tax all foreign made goods now in this country by calling it an excise on the past importation or on the past purchase of imported goods. Or Congress could levy a tax on all real estate by calling it an excise on the last recorded transfer of every parcel of real property. Such taxes would be the very things which the framers of the Constitution sought to prohibit by two distinct provisions. But the substance of constitutional restrictions cannot be nullified by indirect means. *The Child Labor Tax Case, supra; Hill v. Wallace*, 259 U. S. 44 (1922). The direct tax provisions of the Constitution must be given some substantial meaning and effect. The test of absolute and unavoidable demand is the only test which conforms with history, with the adjudicated cases and with the purpose of these restrictions. Unless two express provisions of the Constitution are to be rendered meaningless and of no effect, there seems to be no escape from the conclusion that the tax in the case at bar is an unconstitutional direct tax.

These constitutional restrictions must be given some real effect. As said in *Pollock v. Farmers Loan and Trust Company, supra*, at page 583:

> "But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the

states of which it is composed, would have disappeared and with it one of the bulwarks of private rights and private property."

A late and illuminating opinion on this law as a direct tax is found in *Frew v. Bowers* (2nd Ct. C. C. A. 6-1-26), 12 F. (2nd) 625, where Judge Hough said, p. 628:

> "Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn v. Frick*, 268 U. S. 238, at 251, 45 S. Ct. 487, 69 L. Ed. 934.
>
> "If it is said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away $200,000 in 1910. If that be assumed as possible, it is not possible that the tax so laid, and computed on the gift, its credits and gains, could ever be an excise on the transfer.
>
> "But if the tax be laid as it actually has been, and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of duty, and laying a tax in order generally to regulate some subject

taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. The Child Labor Case, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, is the leading example.

"It follows that we think there was no 'interest' shown in Mr. Nash, justifying the tax laid; but, if the statute required the tax as laid, then the exaction was arbitrary and unconstitutional."

We submit that just as an income tax is a direct tax —a judicial conclusion upon which the states have now put the stamp of their approval through the ratification of the Sixteenth Amendment—so is a tax upon a past gift a direct tax and, unless apportioned, violative of the Constitution.

(B) THE RETROACTIVE PROVISIONS OF SECTION 402 OF THE 1918 FEDERAL ESTATE TAX LAW VIOLATE THE FIFTH AMENDMENT.

We shall contend in this portion of our brief that this tax on a past completed transfer of property amounts to an arbitrary exaction and operates to deprive the Coolidge Estate of property without due process of law.

In similar cases the Government has several times argued that the Fifth Amendment is not a limit on the taxing power of Congress, so a brief discussion may not be out of place.

We know of no actual decision of this Court holding that outside of the prohibition of export taxes and the requirements of apportionment of direct taxes, and of uniformity of indirect taxes Congress may act without restriction in taxation matters. A Federal tax law which afforded the taxpayer no opportunity to be heard, would certainly be held to be bad as a taking without due proc-

To the same effect are *Carrol v. Greenwich Ins. Co.*, 199 U. S. 401, 410 (1904), and *Ex Parte Kemmler*, 136 U. S. 436 (1889).

Nor is there any ground for saying that the taxing power of Congress is greater than that of the states. As pointed out by Mr. Justice Holmes in *Chanler v. Kelsey*, 205 U. S. 466, 480 (1907), the power of the states to impose death duties "is more unlimited than * * * the power of the United States to levy an inheritance tax". This is obvious because the power to impose death duties is based upon the power to regulate the devolution at death—a power resting exclusively in the states.

The vast weight of authority holds that retroactive inheritance tax laws of the states similar to the Federal act now under discussion are unconstitutional under the provisions of the Fourteenth Amendment as a taking of property without due process of law, or a taking of private property for public use without just compensation.

Matter of Pell, 60 N. Y. App. Div. 286, 171 N. Y. 48, is the leading case on this subject and is important for its holding that the tax was a direct tax as well as for its holding that the tax was unconstitutional. The testator died in 1863, creating by will a life estate followed by a remainder. The life tenant died in 1899 after the passage of a New York inheritance tax law expressly taxing all remainders which did not come into actual possession or enjoyment until after the passage of the act. It was undisputed that the remainders were expressly taxable under the statute. The appellate division of the Supreme Court recognized that the tax could not be sustained as an inheritance tax but held the tax to be valid as a direct tax, saying (60 N. Y. App. Div. at pp. 288, 290):

> "If we could conclude under the Transfer Tax Act, that nothing could be taxed but the right of succession, then it would follow in this case, as the

right to succession passed in 1863, that the property here involved was not taxable * * *. Here this tax must be supported, if at all, upon the theory that it is a tax upon property. * * *.

"What the legislature here intends is to tax property * * *. It could not very well tax the right of succession, for that had taken place years before the Tax Act was passed; and we think, therefore, that the tax can only be supported upon the principle that it is a tax on property."

On an appeal by the executor the Court of Appeals agreed with the lower court that the law was unconstitutional as a succession tax; the Court said (171 N. Y. 55):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that, where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of a life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation."

But the Court reversed the judgment upon the ground that, as a matter of construction, the legislature did not intend to impose a direct tax and, therefore, the law could not be upheld as a direct tax.

At page 56, the Court said:

> "We are of the opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax."

The Court then held that even construed as a direct tax it would be invalid.

In re Craig's Estate, supra, involved a transfer intended to take effect at death executed years before the taxing law was passed. In holding the tax unconstitutional, the court said (97 App. Div. 296):

> "The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question; and when the right is conferred by a lawfully executed grant or contract it is property, and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

In *Hunt v. Wickt,* 174 Calif. 205, *supra,* the decedent made a conveyance of land to his wife, placing the deed in escrow for delivery upon his death. After the deed was made, and prior to the decedent's death, a retroactive statute was passed taxing transfers intended to take effect in possession or enjoyment at or after the grantor's death. Chief Justice Angellotti said (p. 208):

"We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a *present title* in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed *transfer of title*, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and *there was no transfer of any property in any legal sense at the time of such death*, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer." (Italics ours.)

Lacey v. State Treasurer, 152 Iowa 477, 132 N. W. 843 (1911), held unconstitutional a retroactive tax on a transfer intended to take effect in possession at death. The court said (p. 483):

> "If the right to the property passed by the conveyance beyond the control of the grantor, it was a vested right; it was not a mere expectancy, like the prospective right of an heir, or the inchoate right of a wife, and it was therefore not subject to burdens which the legislature might attempt to impose by retrospective laws. * * * Any attempted legislation imposing a collateral inheritance tax upon interests in remainder, which have become vested * * * would be unconstitutional."

State v. Probate Court, 102 Minn. 268, 113 N. W. 888 (1907), was a similar holding. The court said:

> "That law is prospective in its operation, and it is beyond the power of the state, even if it so desired, to subject to its operation property which the owner in good faith disposed of before his death."

In re Houston's Estate, 120 Atl. 267, 276 Pa. 330 (1923): in 1918 decedent and her husband created a trust, reserving life estates to themselves with a remainder to one Freeman. Prior to decedent's death the Pennsylvania inheritance tax law was amended so as to increase the rates of tax. The lower court held that this trust fund could not be taxed at the higher rate. The Supreme Court simply quoted the opinion below, affirming it. This opinion says:

> "The claim of the commonwealth to tax this trust estate at 10 per cent., under the Acts of June 20, 1919 (P. L. 521; Pa. St., 1920, § 20465 et seq.),

and May 4, 1921 (P. L. 341), is not supported by the authorities, nor is it agreeable with just principles of taxation. The grantor in the deed parted with her title before the passage of either of these acts of assembly. She reserved no right of revocation, nor did she retain the right of control; for her power exerciseable jointly with the trustee to change investments is a very different thing; the terms of the trust were unchangeable. The deed was not executed with any intent to defraud the commonwealth or to evade the law, nor was it made in such contemplation of death as to bring it within any applicable decision. As soon as the deed was executed, Freeman had a vested right in the property, only defeasible in case of his death (which has not occurred), when it would pass under his will, and his prospective right would have passed by his assignment to others. Serrill's Estate, 15 Wkly. Notes Cas. 470; Wickersham's Appeal, 18 Wkly. Notes Cas. 36. * * *

"Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that, if during the administration of an estate delays occur, as they necessarily must, and if before actual distribution is made the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be a reductio ad absurdum."

In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882 (1905), is a similar holding. The Court said:

"The law sanctioned the gift of Mr. Suffern when it was made, and the law cannot cut down the gift by imposing a transfer tax when there was no transfer."

People v. Trust Company of America, 205 N. Y. 74, 98 N. E. 207 (1912). The New York law imposed a tax on future advances made under existing mortgages. The state sought by this suit to collect a tax from the mortgagees on additional bonds issued under the terms of a mortgage executed before the law was passed. In holding the tax invalid, the Court said:

"The legislature could not impose a tax upon the defendant for a transaction which at the time it was effected was subject to no tax."

To the same effect are the following cases:

Miller v. McLaughlin, 141 Mich. 425; 104 N. W. 777 (1905);

Commonwealth v. Wellford, 114 Va. 372; 76 S. E. 917 (1913);

In re Vanderbilt's Estate, 172 N. Y. 69; 64 N. E. 782 (1902);

In re Lyon's Estate, 233 N. Y. 208; 135 N. E. 247 (1922);

In re Felton's Estate, 176 Cal. 663; 169 Pac. 392 (1917);

State v. Safe Deposit & Trust Co., 132 Md. 251; 103 Atl. 435 (1918);

In re Hitchin's Estate, 97 App. Div. 634; 89 N. Y. S. 1106 (1904);

In re Ripley's Estate, 122 App. Div. 419; 106 N. Y. S. 844 (1907);

In re Haggerty, 128 App. Div. 479; 112 N. Y. 1017 (1908);

In re Chapman, 133 App. Div. 337; 117 N. Y. S. 679 (1909);

In re Smith, 150 App. Div. 805; 135 N. Y. S. 240 (1912);

In re Webber, 151 App. Div. 539; 136 N. Y. S. 83 (1912);

Commonwealth v. McCauley's Executors, 166 Ky. 450; 178 S. W. 411 (1915);

Eury's Executors v. State, 72 Ohio St. 448; 74 N. E. 650 (1905).

The *Pell* case has been cited and followed innumerable times by the courts of New York and other states and its authority has never been weakened. The case was cited with approval by Mr. Justice Holmes in *Chanler v. Kelsey, supra.* This was a dissenting opinion concurred in by Mr. Justice Moody but the portion of the opinion which we quote was in no way contrary to the decision of the majority of the court. In this opinion, Mr. Justice Holmes said at 51 L. Ed. 889:

> "If, then, a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the state; and as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the

continuing of the state's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. Re Pell, 171 N. Y. 48, 55, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Seaman, 147 N. Y. 69, 41 N. E. 401."

The *Pell* case was also cited with approval in another Federal case entitled *Blair v. Harold*, 150 Fed. 199 (1904). In that case the decedent had entered into a partnership with his son and three other persons. Decedent's share in the partnership was to pass to his son on decedent's death. After the partnership agreement had been entered into and shortly before the decedent died, Congress passed the Act of 1898 which imposed an inheritance tax on transfers intended to take effect at death. The Government taxed the son the share in the partnership which he received by the decedent's death and suit was brought to recover the amount of this tax. The Circuit Court held that the tax was illegal, Judge Cross saying at page 205:

> * * * "My conclusion upon this branch of the subject, therefore, is that the partnership agreement was an irrevocable self-executing contract; but whether self-executing or not, upon its delivery DeWitt C. Blair, had vested rights thereunder in the interest of John I. Blair in the partnership property, defeasible only upon the survivorship of John I. Blair, beyond the partnership period, which rights could not be divested by him by will or otherwise. Such being the case, the tax imposed thereon was unwarranted and illegal."

This decision was affirmed by the Circuit Court of Appeals for the Third Circuit, 158 Fed. 804 (1907). At page 806 Judge Dallas said:

> "It cannot be supposed that this partnership agreement was designed to circumvent a statute enacted several years after it was made. It was entered into in good faith, and the rights of the plaintiff then accrued. As was said by the learned District Judge, 'they were absolute and irrevocable so far as the parties were concerned, and were contingent only upon the happening of an event which did happen'. They were acquired by contract, and not by gift made by last will and testament, or otherwise."

Most of the above cases dealt with inheritance rather than with estate taxes; taxes on the right to receive rather than on the right to transmit. By analogy the even more arbitrary exaction from the decedent's estate is *a fortiori* invalid. The reasoning of the above cases that there can be no succession tax where there is no succession is directly applicable to the case at bar.

In *Knoulton v. Moore, supra,* speaking of death duties, the Court said at page 78:

> "Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

In *Wardell v. Blum,* 276 Fed. 226 (1921), the Circuit Court of Appeals of the Ninth Circuit, in holding that a wife's share in community property was not taxable as a part of her husband's estate under the 1916 Federal Law, said at page 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased', from which the conclusion is inevitable that the property upon which such a tax is imposed must, in truth, be the property of the deceased."

These authorities are directly applicable to the present case where the property taxed did not pass at death, was not a part of the decedent's estate and, in fact, had been disposed of long prior to the decedent's death.

The following Federal authorities are pertinent to this discussion.

Chase v. U. S., 222 Fed. 593 (1915). Indian land was realloted pursuant to an act of Congress. In holding that this act was unconstitutional and could not impair the rights of the original allottee, Judge Sanborn of the 8th Circuit Court of Appeals said:

> "No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed."

Wagoner v. Evans, 170 U. S. 588, 42 Lawyers' Ed. 1154 (1898). A Territorial Law of March 5, 1895, authorized counties in Oklahoma to collect taxes upon personal property kept on Indian reservations within the county limits. Defendants, acting under an Oklahoma law, attempted to collect taxes on cattle in the Indian reservation for 1892, 1893, 1894 and 1895. Plaintiff sued to enjoin defendants from collecting taxes except for the year 1895 and thereafter. Both parties appealed.

Affirmed. In delivering the opinion, Mr. Justice Shiras said (42 L. Ed. 1156):

> "It remains to consider the appeal of the taxing authorities of Canadian county.

"They object, in the first place, to that portion of the decree below which restrains them from the collection of taxes for the year 1892, 1893, and 1894. They point to a provision contained in the act of March 5, 1895, enabling the special assessor to assess or reassess property that at any time has, by oversight or negligence, or for any other cause, escaped taxation; and they contend that the act of 1895 was an amendatory statute, and intended to cure a supposed defect in the then existing laws, and cases are cited in which it has been held that such curative statutes can have a retroactive effect, and enable the authorities to assess and collect taxes on property which should have been theretofore assessed.

"It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed no power in the authorities of Canadian county to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment."

The impropriety of reaching back into the past to make past transactions bear the burden of Government is well illustrated by the case of *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U. S. 338, 66 L. Ed. 647 (1922). The state of Florida unlawfully collected a toll from plaintiff for passage through a canal lock. Thereafter a law was passed purporting to validate the collection of the toll. Plaintiff sued to recover the amount collected from him and claimed that the law violated the 14th Amendment. The Supreme Court reversed a judgment in favor of the state. Mr. Justice Holmes said at page 339:

"* * * if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passage through the lock of a canal that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."

In *Frew v. Bowers, supra*, the opinion of Judge Hand, p. 639, goes expressly on the ground that Sec. 402 (c) violates the 5th Amendment.

(C) THE RETROACTIVE PROVISIONS OF THE 1918 ESTATE TAX LAW VIOLATE THE FUNDAMENTAL CONCEPTIONS OF FREE GOVERNMENT.

There has grown up in the decisions of this Court, and other courts, a group of pronouncements to the effect that there are certain things that the legislative body may not do simply because they are too arbitrary, too unreasonable, too unthinkable to be sanctioned by the fundamental and guiding principles of civilized society. We believe that these pronouncements may be properly classified as a body of principles formulated under that wisely elastic phrase "due process of law", but for the purpose of emphasis we shall discuss them under the foregoing heading.

The existence of such a limitation on constitutional power has been recognized in the following cases:

Calder v. Bull, 3 Dallas 386 (1798);

Osborn v. Nicholson, 13 Wall. 654 (1872);

Terrett v. Taylor, 13 U. S. 43 (1815).

Retroactive laws have long been recognized as arbitrary in character. In *Shwab v. Doyle, supra,* this Court expressed itself in no uncertain terms regarding retroactive laws when it quoted with approval the following language of Justice Story (page 534):

> "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

This was said in answer to the Government's contention that the 1916 Estate Tax Law be given a retroactive effect.

When we come to the subject of taxation, the unconstitutionality of arbitrary laws may be placed upon an additional ground. The taxing power of Congress is a granted power. It embraces only contributions for the support of the Government and only such of these contributions as come within the conception of taxation. Thus the power of eminent domain and the power to requisition supplies in war time are not embraced within the meaning of taxation. In the *Pollock* case, *supra,* Mr. Justice Field said at 157 U. S. 599:

> "But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and state; to the invalidity of taxation by the United States of the income of the bonds and securities of the states and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.
>
> "As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers

arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' Citizens Sav. L. Asso. of Cleveland v. Topeka, 87 U. S. 20 Wall. 655 (22:455), and Parkersburg v. Brown, 106 U. S. 487 (37:238)."

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

"This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

Attorney General Olney and Assistant Attorney General Whitney, in their argument in the *Pollock* case, ad-

mitted this inherent limitation on the general taxing power. See 157 U. S. at page 507, and 157 U. S. at page 474, where Mr. Whitney said:

> * * * "there is, however, a certain degree of uniformity involved in the very word 'tax'; a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution. * * * A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be 'uniform on the same class of subjects'; while the Supreme Court of that State has decided that this requirement is merely declaratory. *Kitty Roup's Case*, 82 Penn. St. 211."

Cooley on Constitutional Limitations (7th Ed), at page 695 says:

> "Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

Cooley says on page 41 of his work on Taxation:

> "Vast as is the power of the government to levy taxes upon its citizens, there are nevertheless limitations upon it of a very distinct and positive character, which inhere in the very nature of the power itself. Some of these limitations are commonly declared in the written constitutions, but the declaration is rather from abundant caution than from necessity, as the limitations are equally imperative whether thus declared or not."

In *Savings & Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455 (1874), in speaking of the taxing power, Mr. Justice Miller said at 22 L. Ed. 461:

> "There are limitations on such power which grow out of the essential nature of all free governments."

The Child Labor Tax Case, supra, is a striking illustration of the inherent limitations of the taxing power.

ARBITRARY FEATURES OF THE TAX.

One of the worst features of the tax involved in the case at bar is that it amounts to making A pay a tax on B's property. Is such an exaction within any conceivable meaning of the word *taxation?* Even if it falls within this power of taxation is it not so arbitrary as to be unconstitutional? There can be but one answer to these questions.

U. S. v. Baltimore & Ohio R. R. Co., 84 U. S. 322, 21 L. Ed. 597 (1873). This suit was brought to collect a tax on interest paid to the City of Baltimore on money advanced to aid the construction of the railroad. The tax was to be collected from the railroad and deducted from the interest paid to the City. In holding that this tax

was unconstitutional because really laid on the City, Mr. Justice Hunt said (21 L. Ed. 599):

> "A tax is understood to be a charge, a pecuniary burden, for the support of Government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and of his own property."

In *Hartman v. Greenhow*, 102 U. S. 672 (1881), the question was as to the validity of a statute requiring a tax on bonds to be deducted from coupons payable to bearer, where the coupons had been originally attached to the bonds, but had later been separated and were held by a different owner. The court, speaking unanimously by Mr. Justice Field, said (p. 684):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

If it is not legitimate to require the holder of a coupon to pay the tax levied upon a bond with which it once at least was connected, it surely is not legitimate to require the executor of an estate to pay the tax upon property which has no connection whatever with the estate.

In the oft quoted passage from the *Knowlton Case*, Chief Justice White said at 178 U. S. 76:

"The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus a person dying and leaving an estate of $10,500, bequeaths to a hospital $10,000. The rate of tax would be five per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

And at page 77:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not

transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

A similar tax was held unconstitutional in *Black v. State*, 113 Wis. 205; 89 N. W. 522 (1902), and in *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579 (1895).

The statute under consideration in the present case provides that the tax may be collected from the transferee if there are insufficient funds in the hands of the executor. Where the tax is collected from the transferee exactly the same situation arises that was condemned in the three cases last cited. Since the tax cannot constitutionally be collected from the transferee, the scheme of taxation provided by Congress fails and it is extremely doubtful whether the statute could be partially upheld so as to justify a retroactive tax collected from the executor, as in the present case. However, we give no further consideration to this point because the tax is equally bad when collected from the estate.

To compel executors to pay a tax in respect to property which is not, and never has been, a part of the estate under administration, of which the executors have never had possession or title, and with which the decedent long since parted, and which property was vested in third persons, amounts to nothing more or less than making A pay a tax on property owned by B.

One of the most unfair features of this tax is the fact that it is figured on the value of the property on the date of death. This makes the tax in the Reed case almost double what it would be if it were based on the value of the property at the time of the transfer which is taxed. The Supreme Court of California in *Chambers v. Lamb*, 186 Cal. 261, 199 Pac. 33 (1921), held that this could not be done. The case involved a transfer made in

contemplation of death after the passage of the state inheritance tax law. At decedent's death, the property was of much greater value. The statute does not seem to have made it absolutely clear whether the property was to be valued at the date of death. The Court held that the property must be valued at the date of the transfer. Judge Lennon in delivering the opinion said at page 34:

> "Concisely stated, the basis for the measurement of the tax is the market value of that which changes hands as the result of the act of transfer. Applying these provisions and definitions to the instant case, the tax is imposed upon the market value of the real property passing by the deed of William D. Lamb. $194,775 was the value of the property which thus passed to the transferee. While the property had attained the value of $212,775 at the time of the death of the transferor, the additional $18,000 was not part of the value of the property 'passing' from the grantor to the grantee; it was an increase in value subsequent to the transfer and during a period when the transferee was the owner thereof. The value of the property passing between the parties being the basis for the tax, the increase in value after the actual vesting of rights under the transfer is not to be rated as part of the taxable value."
>
> "The fact that the tax is 'due and payable' upon the death of the transferor is not inconsistent with the rule that the liability for the tax attaches whenever the transfer is completed. The imposition of a tax and its maturity are commonly regarded as distinct and separate stages in the process of taxation."

This case shows the absolute absurdity and inconsistency in the present method of valuation.

One or two hypothetical cases may help to illustrate the injustice of the statute under consideration.

Suppose a farmer in Texas in 1907 had conveyed to a trustee land at that time worth $10,000, and had reserved to himself the income therefrom for life with the remainder over to an invalid nephew. Thereafter the farmer accumulated for his wife and children property worth $100,000 and died after the passage of the 1918 Estate Tax Law. In the meantime, the land placed in trust has been found to contain oil and is worth $2,000,000 at the time of his death. Applying the law as it has been applied in the case at bar, the farmer's gross estate would be valued at $2,100,000, $50,000 would be exempted and assuming no debts or other deductions, his net estate would be $2,050,000. The estate tax would amount to approximately $160,000. This would take all the property in the hands of the executor and leave a deficit of $60,000 to be collected from the nephew or the trustee. The farmer's wife and children would be left penniless as a result of this retroactive taxation.

See *Miller et al. v. U. S.*, U. S. Ct. of Cl., No. D-809 (6-14-26).

Vary the foregoing case by the assumption that the trustee, shortly after receiving the conveyance of the land and before the discovery of oil, sold this land and, under his power to reinvest, bought $10,000 worth of government bonds. Let the other facts remain the same. In this instance, all the property left in the estate would be applied on the tax, the nephew would have to give up to the Government the value of the Government bonds and, under the literal wording of Section 409, both the trustee and the nephew would be personally liable for the $50,000

balance of the tax. The fortuitous jump in values, inuring solely to the benefit of the man who purchased these lands from the trustee, would result through the retroactive application of this tax law in this incredible injustice.

As we have shown heretofore in this brief, the Government has at different times used two different methods of computing the tax. In the case at bar, the tax was figured on the value at the date of decedent's death of the property originally put into the trust although some of that property had been disposed of by the trustee prior to the decedent's death. Clearly the property which had been disposed of and was not in the trust fund at the time of the decedent's death could have no possible relation to the transfer of property at decedent's death or to the decedent's estate. If that property had been sold by the trustee to John Doe and had thereafter greatly increased in value the estate would, nevertheless, have to pay a tax based on John Doe's good fortune. This method of computing the tax is the method which the statute prescribes in clear terms.

On the other hand, in the Reed case the tax was computed on the value at the date of decedent's death of the property at that time in the trust fund although some of this property had never been owned or transferred by the decedent but had been purchased by the trustee. Is there any possible reasoning by which an estate tax or any other kind of transfer tax can be based on property never owned or transferred?

A consideration of the actual effect of computing the tax on the increased value at the date of death brings to light all the inconsistencies, absurdities and injustice of this tax. The value has no relation whatever to the object of taxation.

It is immaterial whether such an exaction be termed a confiscation rather than a tax, or be held to violate the Fifth Amendment, or be held a violation of "Those fundamental conceptions of free government which underlie all constitutional systems." (*Knoulton v. Moore*, 178 U. S. 41, 77.) In any event, it is an unreasonable and unwarranted exercise of legislative power and not the legitimate use of the taxing power.

III.

SECTION 402 (c), REASONABLY CONSTRUED, DOES NOT APPLY TO TRANSACTIONS TAKING PLACE PRIOR TO THE 1916 ESTATE TAX LAW.

As previously stated, we believe that the constitutional questions are conclusive in this case. We recognize, however, that this Court has uniformly sought to avoid the necessity of passing upon the constitutionality of acts of Congress by seeking out some ground for construing a statute so as not to raise the question of constitutionality.

In recognition of this established attitude on the part of this Court, we submit that, reasonably construed, the section of the 1918 Statute under discussion may be held to be retroactive only so far back as September 9, 1916, the date of passage of the 1916 Act. The Court will bear in mind that under the facts before it in the case at bar, all the gifts to the trust were completed before the 1916 estate tax law was passed. By the construction we are suggesting, we do not wish to be understood to argue that such construction would obviate constitutional difficulties in a case where the gifts took place after September 9, 1916, but before the passage of the 1918 law. That situation, however, is not now before the Court and

may be dealt with when it arises. So far as the case at bar is concerned, the construction we are suggesting makes wholly unnecessary the determination of any constitutional question.

We have shown that the first estate tax statute to be enacted by Congress was that of 1916; that from and after the date of its enactment, for the first time, citizens of the United States were actually or constructively put on their notice as to this new taxation policy of the Federal Government. Any man giving away or willing away his property after that date did so with a knowledge of what his acts might involve. The *Shwab* case determined that that statute was only *prospective* in its operation.

When Congress came to pass the 1918 estate tax law, it used the following language in Section 401:

> "That (*in lieu* of the tax imposed by Title II of the Revenue Act of 1916, as amended, and *in lieu* of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum," etc.

This language links the 1918 statute to the 1916 statute and was used by Congress prior to the decision of this Court in the *Shwab* case; therefore it could not have been inserted for the purpose of getting away from the effect of the decision of this Court.

The 1918 Statute contained two new paragraphs. These are Sec. 402, (e) and (f), and read as follows:

> "(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Paragraphs (e) and (f) of Section 402 were not in the 1916 law and in spite of the fact that the retroactive language in Section (c), i. e., "whether such transfer or trust is made or created before or after the passage of this Act", was first inserted in Section (c) when it was re-enacted in 1918, such retroactive language was not put in either Section (e) or Section (f). It is also to be noted that Sections (e) and (f) were evidently inserted for the purpose of closing other possible channels for evading the estate tax law, just as Section (c) was originally placed in the 1916 law for a similar purpose.

It is, therefore, obvious that as to the new transactions, such as those covered by Sections (e) and (f), Congress intended no retroactivity (see *Lewellyn v. Frick*); that is, Congress did not make any express retroactive provisions covering any items made taxable for the first time. But as to transactions such as those covered by Section (c), it intended some retroactivity. The reasonable inference is that when Congress put in express retroactive language to cover transactions taxable under an earlier law and at the same time omitted retroactive language covering transactions made taxable for the first time, Congress did not intend to reach transactions effected at a time when they were non-taxable. In other words, Sections (e) and (f), covering new subject matter and operating only prospectively, needed no retroactive language, whereas Section (c), which had been in effect since September, 1916, required it.

The chief injustice of retroactivity, upon which we have dwelt at length in the earlier portions of this brief, is obviated if Section 402 (c) be made retroactive only to September, 1916, because from and after that date prospective taxpayers had their warning. If the retroactive scope be limited to 1916, the most odious feature of retroactivity is eliminated—the tax does not "impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways." (*Lewellyn v. Frick.*) Not so if it be given a greater retroactivity.

This Court itself has expressed doubt as to the limits of retroactivity of such a statute. In *Shwab v. Doyle*, this Court held that the 1916 law was prospective, basing its decision partly upon the ground that if retroactivity were conceded it was doubtful how far back it would go. On this point the Court said at page 535:

> "The circumstances of this case impel to such selection. *If retroactivity be accepted, what shall mark its limit?*" (Italics ours.)

When it is noted that the 1916 law used the words "*has at any time made a transfer*", it is apparent that the Court was not merely adopting the literal meaning of the words of the statute, but was applying legal rules of construction to reach a reasonable result.

To concede indefinite retroactivity, a construction for which Government's counsel contended, is so shocking to one's sense of fairness and justice that a construction should certainly be sought which will avoid any such conclusion.

Under Section 402 (c) of the 1918 Act it is possible to find a limit preventing unreasonable retroactivity by adopting the date of enactment of the 1916 Act as a break date. This does no violence to the statutory language—

it gives a meaning to it, but confines its operation within reasonable limits.

We shall now call attention briefly to certain rules which this Court has from time to time laid down. They have been repeatedly enunciated, but we select only a few typical cases:

First, in cases of doubt, taxation statutes shall be resolved in favor of the taxpayer and against the Government.

Second, retroactive laws are abhorrent, and if possible a retroactive construction will be avoided.

Third, in order to avoid the necessity of passing upon the constitutionality of an act of Congress, the courts will resort to a reasonable, as opposed to a literal, construction of the statute.

In *Gould v. Gould*, 245 U. S. 151, it was held that alimony did not come within the terms of the items described as "income" in the Income Tax Act of 1913. Mr. Justice McReynolds stated in the opinion, at p. 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the government, and in favor of the citizen.*" (Italics ours.)

In *Reynolds v. M'Arthur*, 2 Peters 417 (1829), at page 434, Marshall, C. J., said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward; and are never to be construed retro-

spectively *unless the language of the Act shall render such construction indispensable.*" (Italics ours.)

To construe the parenthetical language in Section 402 (c) as reaching back seventeen or seventy years is certainly not an "indispensable" construction.

In delivering the opinion in *Southwestern Coal & Improvement Co. v. McBride*, 185 U. S. 499 (1902), Mr. Justice White, at page 503, says:

> "We adopt the reasoning of the court below on the subject. The court said (43 C. C. A. 652, 104 Fed. 473):
>
> "'The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens *in the future*. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract *unless it is so framed as to preclude any other interpretation.*'" (Italics ours.)

Can it be said that the language in Section 402 (c) precludes the interpretation we have suggested, i. e., that the retroactivity be limited to the period subsequent to September 9, 1916? Our suggested interpretation gives some meaning to the word "before". It does no violence to that language.

Union P. R. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 58 L. Ed. 179 (1913) involved ejectment to recover land which was part of plaintiff's right of way. Defendant claimed as adverse possessor for the period required by the state law. The land was not originally

subject to adverse possession because the fee was in the United States, but in 1912 Congress passed a law providing:

> "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way."

Plaintiff claimed that this statute was not retroactive and, if so, was unconstitutional.

On demurrer to the answer, judgment was given for defendant. Reversed on the ground that the statute should not be construed to be retroactive.

Mr. Justice McKenna said at 231 U. S. 199:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. *The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.* The rule has been expressed in varying degrees of strength, but always of one import, that a *retrospective operation will not be given* to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and *inflexible* import of the terms, and the manifest intention of the legislature'." (Citing cases.) (Italics ours.)

At page 200 he said:

> "In *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737, the questions we are now discussing came up for consideration. We there expressed, in considering a statute of limitations whose literal interpretation would have had the effect of making it applicable to actions which had accrued prior to its passage, the rule against retrospective operation—the injustice and unconstitutionality of it. We said that a statute of limitations may affect actions which have accrued as well as those to accrue, and 'whether it does or not will depend upon the language of the act and the apparent intent of the legislature to be gathered therefrom.' But it was said that, *even against a literal interpretation* of the terms of the statute, 'it will be presumed that such was not the intent of the legislature. *Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation.*'" (Italics ours.)

Union Pacific R. Co. v. Snow, 231 U. S. 204, 58 L. Ed. 184 (1913), was a companion case to *U. P. R. Co. v. Laramie Stock Yards Co.*, and involved the same question. In holding that the statute should not be construed to be retroactive, Mr. Justice McKenna said, at 231 U. S. 213:

> "*Courts will not*, as we have seen, *enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend.* Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be

further expanded. Their strength has been pointed out and their sufficiency to *prevail over a literal interpretation* of a statute." (Italics ours.)

It is obvious from the last two cases cited that a literal interpretation does not bind the courts where such literal interpretation raises serious constitutional questions. In *Lewellyn v. Frick, supra,* Mr. Justice Holmes said, at page 251:

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind."

The established practice of this Court to avoid giving to a statute a construction which involves constitutional difficulties was only recently again affirmed by Mr. Justice Van Devanter in *Panama Railroad Co. v. Johnson,* 264 U. S. 375 (1924), as follows (p. 390):

> "But, as this Court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score'."

In *Knoulton v. Moore,* 178 U. S. 41, at page 77, the Court said:

> "We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

In *U. S. v. Kirby,* 74 U. S. 482, 19 L. Ed. 278 (1868), the holding of the case is shown in the following language of Mr. Justice Field at 19 L. Ed. 280:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or

an absurd consequence. It will, always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'That whoever drew blood in the streets should be punished with the utmost severity', did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt'. And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

We find the "rule of reason", so-called, in the matter of statutory construction applied by this Court in the celebrated cases of *Standard Oil Company of New Jersey v. United States*, 221 U. S. 1 (1910) and *United States v. American Tobacco Co.*, 221 U. S. 106 (1910), and in the earlier case of *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892). In the last named case, the court was passing upon the statute prohibiting the importation of aliens under contract to perform labor and the question was whether or not this statute should be applied to an English clergyman who had come to serve a New York church under contract. Mr. Justice Brewer, at page 227 of 36 L. Ed., said:

"It must be conceded that the act of the corporation is within the letter of this section."

After stating the argument, the Justice goes on to say:

"It is a familiar rule that a *thing may be within the letter of the statute and yet not within the statute*, because not within its spirit, nor within the intention of its makers." (Italics ours.)

And later on he says:

"As said in Plowden, 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.'"

And at page 229:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

It was obviously the purpose of Congress by the enactment of Section 402 (c) both in its 1906 and its 1908 forms to preclude evasions of the law. There could be no evasion prior to September 9, 1906, because before that date there was no law to evade. This purpose is fully accomplished by construing the 1908 form of the section as retroactive back to, but not prior to, September 9, 1906, and it avoids the unjust interpretation thereof which would be contrary to the canons of statutory construction outlined above.

The construction we have suggested, therefore, gives heed to the rules, first, that doubts should be resolved against the government and in favor of the taxpayer; second, that retroactive construction should be avoided unless no other reasonable construction can be found; third, that the literal construction need not be adopted where a reasonable construction will obviate the necessity of deciding grave constitutional questions. The construction we have urged gives some meaning to the retroactive parenthetical clause. When carefully considered, the cases of *Shaub v. Doyle* and *Lewellyn v. Frick* clearly sustain such a construction. A hasty perusal of the statute may leave at first the impression that the retroactivity of the statute is unlimited, but a more careful consideration shows that the construction for which we contend is not only consistent with the wording of the statute, but conforms to the legislative intent and is, in fact, the most reasonable construction which can be adopted. It does no violence to language and, as applied to the facts in the case at bar, avoids a hardship and an injustice from which the courts must shrink.

CONCLUSION.

Literally construed the Statute forces upon the Court the determination of its constitutionality. We have shown that the constitutional questions may be avoided by the adoption of a reasonable construction of the statute.

The provisions of the 1926 Federal Estate Tax Act when applied literally to a situation such as that presented by the Reed case or the Coolidge case, impose taxes upon transfers and gifts completed before the enactment of the law. The tax is absolute and unavoidable. It leaves open to the taxpayer no option of creating or of foregoing the creating of a taxable situation. It taxes him merely because of the past exercise of one of the attributes of the ownership of property. It therefore falls in the category of direct taxes and being unapportioned is unconstitutional.

These retroactive provisions impose consequences upon the legitimate, prior acts of men utterly beyond their possible contemplation. As a result, property is taken under the guise of taxation and taken in a way which violates the fundamental conceptions of organized society. We contend that this is a taking in violation of the Fifth Amendment of the Constitution.

For some good reason the Almighty dropped a curtain before our eyes and concealed the future from us. The whole scheme of human life is worked out on this basis. This has its advantages and its apparent disadvantages, but regardless of the theoretical preponderance one way or the other, the fact is we cannot successfully peer into the future. Political institutions and man-made laws of necessity must be worked out in the light of the foregoing fact. A disregard of it is so inherently opposed to reason as to be almost inconceivable. Men have to live and plan their daily lives in the light of what they know or may fairly be presumed to know. They have

to arrange their affairs, make their decisions, choose between one course of conduct and another in the light of present conditions, modified to some extent possibly by the dimly half light of a guess as to the future.

A woman in 1907 makes a contract in the form of a trust. She complies with the law. She parts with her property under certain specified conditions, both conservative and commendable; she does it irrevocably. She acts in the light of conditions present to her in 1907; the laws then existing are read into her trust. No estate tax law exists then or until nine years later. She does not know about it, because it is unknowable. She makes her calculations and arranges her affairs in necessary ignorance of what is to be. She does not evade. There is nothing to attempt to evade. Then in 1916, or 1918, a Congress comes into being and by the enactment of a law gives a quality to the acts of this woman never intended or guessed at by her and fastens upon those acts serious consequences which were never in her contemplation.

Was it not the recognition of such possibilities in analogous situations, that put into the Constitution the inhibition against *ex post facto* laws? Mr. Chief Justice Taft, in the *Child Labor Tax Case*, *supra*, said at 259 U. S. 38:

> "The difference between a tax and a penalty is sometimes difficult to define."

The effect of the tax in the case at bar is to penalize retroactively.

Do not the provisions of the Statute under consideration "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems"?

We submit that the judgment of the court below should be affirmed, if not on the ground that Section 402 (c) rightly construed is retroactive only to 1956, then on the ground that the Section is unconstitutional.

Respectfully submitted,

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PETER H. HOLME,
HAROLD D. ROBERTS,
J. CHURCHILL OWEN,

Amici Curiae.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 88.

MALCOLM E. NICHOLS, as United States Collector of Internal Revenue,
Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*, as executors,
Defendants-in-Error.

NOTICE OF MOTION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

ABRAM J. ROSE,
As Amicus Curiae.

INDEX.

Authorities Cited.

STATUTES:

CASES:

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HAROLD J. COOLIDGE, *et al.*, as executors,

Defendants-in-Error.

Notice of Motion.

PLEASE TAKE NOTICE that a motion will be made before the Court on Monday, January 3rd, 1927, at the opening of the Court on that day, or as soon thereafter as will be convenient to do so, for permission to file the annexed brief in the above entitled cause by the undersigned as *amicus curiae*.

Dated, December 16th, 1926.

ABRAM J. ROSE,
115 Broadway,
New York City.

To:

THE SOLICITOR-GENERAL,
Washington, D. C.

STOREY, THORNDIKE, PALMER & DODGE, ESQUIRES,
Attorneys for Defendants-in-Error.

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Defendants-in-Error.

BRIEF FILED AS AMICUS CURIAE, BY PERMISSION OF THE COURT, BY COUNSEL FOR RESPONDENTS IN BOWERS, AS COLLECTOR, PETITIONER VS. FREW, ET AL., AS EXECUTORS, RESPONDENTS, ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT, OCTOBER TERM, 1926, NO. 615.

Summary of Argument.

I. The transfer in trust of July 29, 1907, made by Mrs. Coolidge divested her of all ownership in and dominion over the property transferred without any power being reserved by her thereafter to revoke, alter or amend the terms of the trust. The transfer became a

completed transaction in 1907 and the rights of the beneficiaries thereunder became fixed and unalterable prior to the passage of any Federal estate tax law. If the Revenue Act of 1918 be held applicable to such a transfer it would be a direct and not an excise tax, and unconstitutional because not laid in proper relation to the census or enumeration as provided in Article I, Section 9, Sub-division IV of the Federal Constitution, and would take the property of the decedent's estate without due process of law in violation of the Fifth Amendment thereto.

II. If the Revenue Act of 1918 be held applicable to such a transaction—and construed not to be a direct tax but as imposing an indirect or excise tax—it would be unconstitutional because an arbitrary and unreasonable exercise of the taxing power and not within any power granted to Congress by the Constitution.

III. In the property transferred in 1907, Mrs. Coolidge had no interest upon her death in 1921 within the meaning of Section 402 (c) of the Revenue Act of 1918.

POINT I.

The transfer in trust of July 29, 1907, made by Mrs. Coolidge divested her of all ownership in and dominion over the property transferred without any power being reserved by her thereafter to revoke, alter or amend the terms of the trust. The transfer became a completed transaction in 1907 and the rights of the beneficiaries thereunder became fixed and unalterable prior to the passage of any Federal Estate Tax Law. If the Revenue Act be held applicable to such a transfer, it would be a direct and not an excise tax and unconstitutional because not laid in proper relation to the census or enumeration as provided in Article I, Section 9, Sub-division IV of the Federal Constitution and would take the property of the decedent's estate without due process of law in violation of the Fifth Amendment thereto.

It was held by the District Court that the effect of the transfer of July 29, 1907, was to divest Mrs. Coolidge of all interest in the property transferred, the sons becoming in effect equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents or the survivor of them, his share would go to his next of kin; that the interest of the sons was not a contingent interest, but rather a vested interest liable to be divested by death before the death of the survivor of the parents; and that the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, retaining no interest therein which

As stated by District Judge Brewster:

> "You have before you a situation where the decedent during her lifetime and at a time when no tax was imposed on the transfer, had entirely divested herself of all interest in the trust property which was included by the Commissioner of Internal Revenue in the gross estate. It was a completed transaction. All interests in the property had vested in others" (Opinion Brewster, J., 4 Fed. Rep. 2nd, 112 at p. 116).

Accordingly, at the time of Mrs. Coolidge's death there was nothing against which a transfer tax could be assessed, and to quote Mr. Justice Holmes in *Chanler v. Kelsey*, 205 U. S. 466 at p. 480:

> "No matter what other taxes might be levied a succession tax could not be. * * *."

A statute levying a tax upon a privilege exercised or enjoyed before the law was passed would, therefore, not be an excise or an indirect tax because there would be no subject matter to tax, but a direct tax against the property of the transferor.

> *Frick v. Lewellyn*, 298 Fed. Rep. 803, affirmed 268 U. S. 238;
> *Free v. Bowers*, 12 Fed. Rep. 2nd, 625;
> *Matter of Pell*, 171 N. Y. 48;
> *Matter of Craig*, 97 App. Div. (N. Y.) 289, affirmed on opinion below, 181 N. Y. 551.

In *Frick v. Lewellyn*, *supra*, District Judge Thompson, after explaining the purpose and basis of a transfer tax, said:

> "Here the statute arbitrarily makes something

> a part of the Frick Estate which in fact was no part of it and upon the value of that, undertakes to levy an estate tax, an *ad valorem* transfer excise tax amounting to 25% of the value. This, in my judgment, is the taking of property without due process of law; the levying of a direct tax without apportionment as required by the Constitution."

Nor, under the guise of assessing a tax upon the transfer of Mrs. Coolidge's estate at the time of her death, could Congress include as a measure of the tax, property transferred on which at the time of transfer no excise or transfer tax had been laid.

In the *Frick* case, 268 U. S. 238, MR. JUSTICE HOLMES said:

> "The defendants in error say that if these policies are covered by the statute, these sections show that the beneficiaries are taxed upon their own property under the guise of a tax upon the transfer of his estate by Mr. Frick and that this is taking their property without due process of law—citing *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789 and other cases. In view of their liability the objection cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax."

And in *Frew v. Bowers*, CIRCUIT JUDGE HOUGH gave expression to similar views:

> "But if the tax be laid as it actually has been and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to

use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of a duty and laying a tax in order generally to regulate some subject taxable but not otherwise subject to national regulation. The real purpose is dealt with notwithstanding the cloak. The Child Labor cases, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, is the leading example."

Moreover, a construction that the Act of 1918 was not intended to include completed transactions under which the rights of the parties had become fixed and unalterable prior to its passage, would be in harmony with the almost universal rule that statutes imposing taxes on transfers are not applicable to completed transactions under which the rights of the parties have become absolute and irrevocable prior to the passage of the statute.

Shcab v. *Doyle*, 258 U. S. 529;
Union Trust Co. v. *Wardell*, 258 U. S. 537;
Levy v. *Wardell*, 258 U. S. 542;
Knox v. *McElligott*, 258 U. S. 546;
Lewellyn v. *Frick*, 268 U. S. 238.

In the *Shcab* case, MR. JUSTICE MCKENNA observed:

"We need only say that we have given careful consideration to the opposing argument and cases and careful study of the tax of the Act of Congress and have resolved that it should not be construed to apply to transactions completed when the Act became a law. And this we repeat is in accord with principle and authority. It is the proclamation of both that a statute should not be

given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

Among many cases holding this doctrine besides those of this Court referred to, are:

Lynch v. *Congdon*, 1 Fed. Rep. 2nd, 133;
Carter v. *English*, 15 Fed. Rep. (2d) 6;
Kissam v. *McElligott*, 280 Fed. Rep. 212, referred to with approval in *Knox* v. *McElliott*, 258 U. S. 546, at p. 548;
Matter of Lyon, 233 N. Y. 208;
Matter of Langdon, 153 N. Y. 6;
Matter of Hitchins, 43 Misc. 485;
Hunt v. *Wicht*, 174 Cal. 205;
Estate of Felton, 176 Cal. 663;
Estate of Guernsey, 177 Cal. 211;
Blodgett v. *Union & New Haven Trust Co.*, 97 Conn. 405;
Lacey v. *State Treasurer*, 152 Iowa 477;
Commonwealth v. *Welford*, 114 Va. 372;
Pullen v. *Commissioners*, 66 North Carolina 361;
State v. *Safe Deposit & Trust Co. of Baltimore*, 132 Maryland 251;
State v. *Probate Court of Washington Co.*, 102 Minn. 268;
Eury v. *State*, 75 Ohio State 448;
Houston's Estate, 276 Penn. 330;
Miller v. *McLaughlin*, 141 Mich. 425.

If it be said that the additional words in the Act of 1918, "whether such transfer or trust is made or created

before or after the passage of this Act", show the intent of Congress to make that act cover transfers made before as well as after the passage of the Act, it should be answered that unless the words used are too strong to permit of any other construction, Congress ought not to be held to have intended to contravene the well settled rule laid down in the cases referred to, but to have intended to make taxable transfers or trusts under which the rights of the parties were still ambulatory and revokable, although the instrument of conveyance or the act by which the transfer was made or the trust was created ante-dated the passage of the statute. In other words, it can reasonably be said that the purpose of the added words was to place a transfer or trust made or created by deed or other conveyance before the passage of the statute, under which the transferor had not divested himself of title, and the right of revocation remained in him until his death, and, therefore, of a testamentary character, upon a footing with a transaction by will or by descent. Given this meaning the Act of 1918, as well as the Act of 1916, would be in harmony with other statutes levying "death duties", the generating source of which is the death of the transferor (178 U. S., p. 56). And this meaning has been given to tax statutes in which the identical phrase appears.

> *Matter of Seaman*, 147 N. Y. 69;
> *Matter of Schmidlapp*, 236 N. Y. 278;
> *Talmadge* v. *Seaman*, 9 Misc. 303;
> *Matter of Forsyth*, 10 Misc. 477.

Such a construction, to quote Mr. Justice Holmes in the *Frick* case, would not only avoid doubts as to its constitutionality "but the general principle 'that laws

are not to be considered as applying to cases which arose before their passage' is preserved when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it and to use their money in other ways".

POINT II.

If the Revenue Act of 1918 be held applicable to such a transaction—and construed not to be a direct tax but as imposing an indirect or excise tax—it would be unconstitutional because an arbitrary and unreasonable exercise of the taxing power and not within any power granted to Congress by the Constitution.

It is said that the statute does not lay a tax upon the succession to the remainders payable by the remaindermen or by the *res*, but that it is levied against the transferor's estate, and directs that the value of property transferred in contemplation of death or in trust to take effect in possession and enjoyment at or after the death of the transferor, whether before or after the passage of the statute, shall be included for the purpose of determining the measure of the tax for which his estate is liable. Congress clearly could not lay a direct tax against property transferred prior to the passage of the statute, without apportionment. Could it then do that indirectly under the guise of an excise tax, by making something a part of the decedent's estate which was no part thereof at the time the tax was levied?

If Congress could include in the measure of the tax property which the decedent had no title to or ownership over at the time of his death, simply because the

transfer thereof previous to the enactment of the tax law had been made in contemplation of death or to take effect in possession and enjoyment at or after his death, there is no reason why it could not include in the measure of the tax, property transferred by him by gift absolute or conveyance in fee simple at any time previous to the enactment of the tax law.

The capriciousness and unreasonableness of the Act of 1918 so construed was clearly demonstrated by CIRCUIT JUDGE HAND in the *Frew* case in considering the identical provisions of the Act of 1921.

> "In substance," he says, "it imposes a tax upon the settlor, measured by the value of property at his death over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect, I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed, it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fifty fold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth. This is a far more grevious injustice."

An illustration of the arbitrary and unreasonable character of the law so construed is afforded by the facts in the *Frew* case. At the time the transfer in that case was made the securities transferred were valued at $200,000. By sale and re-investment the property transferred in 1910 had produced in 1922, the time of the transferor's death, securities of the value of upwards of $500,000, and, although neither Mr. Nash nor his estate ever owned or had any title to $300,000 of the securities, and no transfer thereof had ever been made by him during his life, or by his will, or by descent from him, the Treasury laid a tax upon his estate in respect of the $500,000, which in 1922 represented the value of the $200,000 worth of securities which he had transferred in 1910.

As said by CIRCUIT JUDGE HAND, in the *Frew* case, such a law has no relation to the possessions of the taxpayer but imposes burdens in accordance with another's wealth which is a far more grievous injustice, and if the rule be taken unconditionally "taxpayers may be selected by lot and assessments may vary with the price of wheat" (12 Fed. Rep. 2, p. 630).

POINT III.

In the property transferred in 1907 Mrs. Coolidge had no interest upon her death in 1921 within the meaning of Section 402 (c) of the Revenue Act of 1918.

The Revenue Act of 1918, Section 402 (c) provided that, according to certain percentages, a tax was to be imposed upon the net estate of every decedent dying after the passage of the act:

> "(c) To the extent of any *interest* therein of which the decedent has at any time made a trans-

> fer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) except in a case of a *bona fide* sale for a fair consideration in money's worth."

In the *Frew* case, CIRCUIT JUDGE HOUGH expressed the view that the phrase "take effect in possession or enjoyment" means the time when the rights of the parties "vest" and not the period when the remainders "fall in", and that if the transfer of an estate results in the immediate vesting thereof and of each and every part of the same, the transaction is *complete* and the grantor or transferor has no "*interest*" left therein.

In support of this view JUDGE HOUGH referred to the tax laid against Mr. Nash's estate based on the value in 1922 of the securities transferred in 1910:

> "How in any reasonable usage of the word, Mr. Nash can be said to have an 'interest' in 1922 in what he never owned because he 'transferred' in 1910 the capital so skilfully increased by others, we are quite unable to perceive. * * * The $500,000 worth of personalty under consideration was no part of the estate, gross or net, of Mr. Nash and it is noticeable that the statute does not attempt to say that it does so belong. At the utmost and under the second above stated construction of the word 'interest' it only directs that the 'value' of the interest transferred shall be *included* in determining the tax on the estate of which the decedent died seized or possessed.
>
> Thus it is seen that what this statute was held to mean by the decision below, is this:

> The excise tax on the transfer of property accruing by reason of the death of A, payable only out of A's estate and graduated by the size of that estate, is augmented by treating as part of A's property, the property of another, three-fifths of which Mr. Nash never owned and two-fifths of which he gave to that other 12 years before his death.
>
> Thus we must first decide whether, within the meaning of the Statute, Mr. Nash at the moment of his death had any *interest* within the meaning of the Act; we are inclined to hold that the applicable words should be treated technically and that, therefore, there was no *interest* left from or arising out of the gift computed in 1910."

In coming to this conclusion, he stated that he agreed with the reasoning of JUDGE BREWSTER in the present case (Opinion HOUGH, CIRCUIT JUDGE, 12 Fed. Rep. 2nd, at p. 628).

In the view that the phrase "to take effect in possession or enjoyment" means the time when the rights of the parties "vest" and not the period when the remainders "fall in", JUDGE HOUGH is supported by the decisions in

> *Dexter* v. *Treasurer & Receiver General*, 243 Mass. 523, at p. 526;
>
> *Bradley* v. *Nichols, Collector*, 13 Fed. Rep. 2nd 857, at p. 859.

In the latter case, DISTRICT JUDGE MORTON, sitting in the District Court for the District of Massachusetts, said:

> "To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part

of the donor's estate, is to say something which is simply not true. * * * Without undertaking to discuss the numerous decisions which have been referred to, I may say that, in my judgment, the law, in taxing as part of decedents' estates property of which they had completely divested themselves before death, has gone to the extreme limit which can be candidly defended, and that the enormous extension of it contended for by the Government in this case is not fairly within the contemplation and meaning of the statute in question, and, if it be within the meaning, the Statute is to that extent unconstitutional."

Respectfully submitted,

ABRAM J. ROSE,
As Amicus Curiae.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926—No. 88.

MALCOLM E. NICHOLS, Collector,
Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.,*
Defendants-in-Error.

NOTICE OF MOTION FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE*, AND BRIEF.

LEONARD B. SMITH,
Attorney for Irving Bank and Trust Company, as Trustee under a Trust Deed executed by Alonzo R. Peck, deceased, Amicus Curiae.

INDEX.

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—against—

HAROLD J. COOLIDGE, *et al.*,

Defendants-in-Error.

Notice of Motion.

Sirs:

PLEASE TAKE NOTICE that the undersigned will move this Court at the Capitol, in the City of Washington, D. C., on the 29th day of November, 1926, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for leave to submit, as *amicus curiae*, a brief in the above entitled action, of which a copy is hereto annexed.

Dated, November 8, 1926.

LEONARD B. SMITH,
Attorney for Irving Bank and Trust Company, as Trustee under a Trust Deed executed by Alonzo R. Peck, deceased, *Amicus Curiae*.

To:

HON. JOHN G. SARGENT, Attorney-General,
Attorney for Plaintiff-in-Error.

ROBERT G. DODGE, ESQ.,
Attorney for Defendants-in-Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926—No. 88.

MALCOLM E. NICHOLS, Collector,

Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*,

Defendants-in-Error.

BRIEF TO BE SUBMITTED BY IRVING BANK AND TRUST COMPANY, AS TRUSTEE UNDER A TRUST DEED EXECUTED BY ALONZO R. PECK, DECEASED, AS AMICUS CURIAE.

The only phase of the controversy discussed in this brief is the question whether the transfer by the decedent of the real and personal property covered by the trust deed of July 29, 1907, and the assignment of April 6, 1917, constituted a transfer intended to take effect in possession or enjoyment at or after the death of the grantor, within the meaning of the Revenue Act of 1918. The learned District Court held that it was such a transfer, but that it escaped taxation by reason of the unconstitutionality of the retroactive clause in the Act. If however, as we maintain, the transfer in question was not a transfer intended to take effect at or after the death of the grantor, within the meaning of the

statute, then it could not in any view of the case be taxable under the provisions of the Revenue Act of 1918, and it thus becomes unnecessary for this Court to pass upon the question of the constitutionality of that Act.

POINTS.

I.

The transfer effected by the deed of 1907 and the assignment of 1917 was not one intended to take effect in possession or enjoyment at or after the death of the grantors, within the meaning of the Revenue Act of 1918.

By the deed of 1907 and the assignment of 1917 (both of which instruments had taken effect prior to the passage of the Revenue Act of 1918), the decedent had conveyed certain real and personal property to trustees, in trust to pay the income to her children during the decedent's life, with remainders (also to the children), which were to take effect upon the death of the grantor. For reasons stated in the opinion, there was no merger of life estate and remainders, and it is indisputable that the *remainders* could not vest in the remaindermen in possession or enjoyment until the death of the grantor. But the life estates had vested in possession and enjoyment (the trustees having the possession and the children the beneficial enjoyment), so that after the assignment of 1917, the decedent herself had no share or interest whatever either in the possession or in the enjoyment of the property.

The transfer, then, which it is sought to tax under the Act of 1918, was a transfer by which the grantor had divested herself during her lifetime of the possession and enjoyment of the property, as well as the title thereto; but by the terms of which certain of the transferees (the remaindermen) could not receive the possession and enjoyment of the property from their predecessors in possession and enjoyment (the life tenants) until after the death of the grantor. The only question on which we ask to be heard is whether such a transfer is a transfer intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of the Revenue Act of 1918.

The precise point at issue has been decided only once before the case at bar, so far as we can learn, and that was in the case of

Curley v. *Tait*, 276 Fed. 840.

The case cited was a decision by Judge Rose, in the District Court of Maryland. It does not seem to have been considered by the Court below in the case at bar, as it is not mentioned in the opinion.

The facts in *Curley* v. *Tait* were more favorable to the Government's contention than in the case at bar. The decedent Grafflin, by an instrument in the nature of a marriage settlement, had transferred certain securities to Johns Hopkins Hospital, the grantee covenanting to pay the income therefrom to the grantor's intended wife during her life, and after her death to the grantor during his life, if he should be the survivor. Upon the death of both the grantor and his wife, but not before, the securities would become the absolute property of the

Hospital. The grantor died before his wife, so that the contingent interest in the income which he thus reserved to himself was extinguished and never took effect.

The only distinction that we can see between *Curley* v. *Tait* and the case at bar, is that in the former, the instrument of transfer did reserve to the grantor a *contingent* interest in the income, which, however, never took effect; while in the case at bar, after the assignment of April 6, 1917, the grantors no longer retained any interest whatever, contingent or otherwise, in the fund. In both cases, possession of the property transferred was delivered to the grantee at the time of the transfer of title.

In *Curley* v. *Tait*, as in the case at bar, a tax was assessed upon the property transferred, upon the ground that the remainders could not vest in possession and enjoyment until at or after the death of the grantor. The learned District Judge, however, held that this was not enough to make the fund taxable. His opinion says at page 841:

> "Was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the Hospital, which covenanted to pay the net income thereof to the prospective wife during her life; Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor. The govern-

ment answers 'Yes'. It says that the Hospital was not to enjoy the stock until after his death. True; but is that all that is necessary?

If all beneficial ownership and possession irrevocably passes from the transferor at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death, and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, 'the interest' which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little or nothing. As he died before his wife, it proved to be in fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the arrangement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities, and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness."

The foregoing language is clearly applicable to the case at bar, except the reference to the contingent interest reserved by the grantor to himself. As above pointed out, no such interest was reserved by the grantors in the case at bar.

Since the decision in the case at bar, our own case had been decided by Judge Goddard in the District Court for the Southern District of New York.

> *Irving Bank-Columbia Trust Co.* v. *Bowers*, decided August 19th, 1926.

The facts in our case were substantially similar to those in *Curley* v. *Tait, supra*, and the decision was in a short memorandum upon substantially the same grounds, viz., that the decedent, after the date of the transfer, "had no interest" in the property which could subject the transfer to the Estate Tax upon his death.

As the two decisions upon the precise point are only District Court decisions, it now remains to test their soundness by analysis of the principles governing the question. This we shall endeavor to do in the next point.

II.

The decisions relied upon by the Government are not in point.

In the Court below, the Government relied upon decisions of various State courts, construing State legacy tax laws, such as

> *In re Cruger*, 54 App. Div. (N. Y.) 405;
> *State Street Trust Co.* v. *Stevens*, 209 Mass. 373;

to which we will add the comparatively recent case of

Matter of Dunlap, 205 App. Div. (N. Y.) 128,

which carries to its ultimate length the ruling in the earlier cases now relied upon by the Government.

All such cases, we respectfully submit, are inapplicable to the case at bar on account of the difference in the nature of the taxes to which they respectively relate. Both the Massachusetts tax (St. 1907, c. 563, §1, codified in St. 1909, c. 490, Part IV, §1), and the New York tax (Laws of 1892, chap. 399, subsequently Tax Law, Article X), are, as is well known, legacy or succession taxes, imposed upon the respective shares of the several legatees or beneficiaries.

The Federal Estate Tax is a tax on the power to transmit, while legacy taxes such as the New York and Massachusetts taxes are on the privilege of receiving.

New York Trust Co. v. *Eisner*, 256 U. S. 345;
Y. M. C. A. v. *Davis*, 264 U. S. 47.

In *Y. M. C. A.* v. *Davis*, *supra*, the opinion says of the Federal Estate Tax, at page 50:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased by reason of the death*. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49."

We respectfully submit that the language above quoted completely disposes of the Government's contention in the case at bar, because the Court below found (4 Fed. 2nd Series, p. 115), and we believe it is not disputed by the Government, that

> "the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, *retaining no interest therein which would cease upon her death.*"

It seems to us that a comparison of the two foregoing statements will utterly demolish the claim of the Government that the transfer in question can possibly be subject to the Federal Estate Tax.

As the remainders created by the trust deed could not vest in possession or enjoyment until at or after the death of the grantors, it may well be that the *privilege of receiving them* is taxable under the Massachusetts Inheritance Tax as a transfer intended to take effect at or after the death of the grantors. This is in no way inconsistent with the contention that the *power to transmit* is not taxable under the Federal Estate Tax, because the grantors, in exercising that power, transferred the possession and enjoyment of the property at the same time that they transferred the legal and equitable title, and as far as they were concerned, the transfer took effect in possession and enjoyment immediately, and not at any future time at all.

The Federal Estate Tax looks at the transfer only from the standpoint of the grantor or decedent; it comes in ahead of the receipt by the beneficiaries of their

respective shares and is not concerned with the respective amounts of such shares, or with the time or manner in which the beneficiaries acquire them. The tax is the same whether or not the estate is carved into life estates and remainders, whether it is divided into few or many shares, and whether it passes to near or distant relatives of the decedent or to strangers.

> "Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries."
>
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50.

> "As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States."
>
> *N. Y. Trust Co.* v. *Eisner*, 257 U. S. 345, 349.

> "The transfer which is taxed is not a transfer of separate parts of the decedent's estate by a single instrument nor separate transfers by the decedent of his estate but it is a transfer by death, of all that property which is defined by the statute as the 'net estate', regardless of how the right of the transferees may arise."
>
> *Farmers L. & T. Co.* v. *Winthrop*, 238 N. Y. 488, 497.

> "It (the tax) comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death,

but the interest which ceased by reason of the death'."

Edwards v. *Slocum*, 264 U. S. 61, 62.

Looking at the case, therefore, from the standpoint of the decedent, it is undisputed that she had transferred before her death all her interest in the property, retaining no interest which ceased upon her death, and we therefore think it established by the foregoing authorities that the transfer was not subject to the Federal Estate Tax. The same result may be reached in a little different way, by analyzing the undisputed facts of the case to ascertain what *did*, as well as what *did not*, take place upon the death of the decedent Sarah J. Coolidge.

Upon the death of the decedent, the equitable life estates which she had created fell in, and the remainders vested in possession, the remaindermen being (with some possible exceptions), the same persons as the life beneficiaries. There was then a transfer at that time of the possession, if not of the enjoyment, of the property. The Government claims that this transfer was taxable; but let us examine it a little more closely to see what kind of a transfer it was.

The present Estate Tax does not impose any tax upon the falling in of life estates or vesting of remainders *as such*, nor upon the consequent transfer of possession or enjoyment from the life tenant to the remainderman. The Government has constitutional power to impose such a tax, and by the Internal Revenue Act of 1864 it did thus impose a tax upon "all dispositions of real estate, taking effect upon the death of any person". Under that Act, the devolution of real property upon the termination of a life estate was taxable, no matter

how or by whom such estate was created, or who might be the life tenant.

> *Matter of Keeney*, 222 U. S. 525, 534;
> *Scholey* v. *Rew*, 23 Wall. 331, 347;
> *Knowlton* v. *Moore*, 178 U. S. 41, 78-81.

But the theory and scope of the present Estate Tax are totally different from those of the tax of 1864. The present tax, as we have seen, is imposed upon the net estate left by a decedent. The fund involved in the case at bar did not form part of the net estate left by the decedent within the ordinary meaning of the term, and can not be taxable unless it is brought into the gross estate by the provisions of Section 402 (c) of the Revenue Act of 1918, which provides that there shall be included in the gross estate the value of the property

> "(c) To the extent of any interest therein of which *the decedent* has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *."

The only kind of a transfer thus taxed is one made by *the decedent*. The effect of the transfer so made by the decedent must be considered both as to the legal and equitable title to the property, and as to the possession and enjoyment of it.

Whether, in any given case, the legal or equitable *title* to property has been transferred is, we suppose, a pure question of law; but whether, or at what time, there has been a transfer of the possession and enjoyment of property seems to us almost a pure question of fact. The question who has had physical possession of

specific property at any given time, and who has actually enjoyed the income and other fruits of it, are questions to be met by evidence, not to be answered by argument or citation of authorities.

In the case at bar, the decedent transferred the legal title to the trustees and remaindermen by the deed of 1907, and she transferred her equitable life estate to her children by the assignment of 1917. That was the legal effect of the instruments which she is admitted to have executed, and after such execution, no vestige of title remained in the decedent. As to the possession and enjoyment; the decedent transferred the possession of the property to the trustees at the time of executing the trust deed of 1907, by actual delivery of the property, and she transferred the beneficial enjoyment to her children at the time of the assignment of 1917, by ceasing to receive the income, which the assignees thereafter enjoyed. This was proved by evidence uncontroverted. After the assignment of 1917, the decedent could not again transfer the possession or enjoyment of the property to anyone else, because she no longer had them. No further transfer of the possession or enjoyment *by the decedent* was possible.

The only transfer of possession or enjoyment which took place upon the decedent's death, was, as a plain matter of fact, a mere physical delivery of possession by the trustees to the remaindermen. In no sense of the term could this delivery of possession be called a transfer *by the decedent*, or of any "interest" which the decedent had in the property. It was a transfer of possession from one of her grantees to another. It was therefore not within the scope of the Estate Tax Law either in letter or in spirit.

It is argued that the transfer of possession on the death of the decedent was a result or *"effect"* of the trust deed. Of course, in one sense, the *effect* of the transfer by the trust deed upon the possession and enjoyment of the property will continue *in perpetuum*, or at least until some one establishes title to the property by adverse possession; but the *taking* effect of the transfer in possession or enjoyment can occur only once, and that is when the transferor transfers the possession and enjoyment. In the case at bar, that occurred during decedent's lifetime, not at or after her death.

The question here presented is of public interest and importance, because the Treasury Department, in the regulations promulgated for the assessment of the Estate Tax, has attempted to set up a rule bearing upon the question which we think is inconsistent with the provisions of the statute. At the present time this rule is contained in Regulations 70, Art. 18, last paragraph, reading as follows:

> "Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's

> life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable."

After considerable study of the foregoing paragraph we confess that we are unable fully to fathom its intended meaning, but we think that this much is clear from the last two sentences: In case of an absolute transfer of property *inter vivos* which conveys to one grantee an estate *pur auter vie* for the life of the grantor, with remainder upon the grantor's death absolutely to a second grantee, the Department intends to assess the Estate Tax upon the transfer *to the remainderman* (though not upon the transfer to the life tenant) as a transfer intended to take effect at or after the death of the grantor. This notwithstanding that after the date of the transfer, the grantor no longer had any share or interest in the legal or equitable title, possession or enjoyment of the property. If our argument is sound, such a tax is entirely illegal. It is important for the public that the question of the legality of this provision of the regulations should be clearly settled.

III.

The writ of error should be dismissed, upon the ground that no question of constitutionality is involved.

All of which is respectfully submitted.

LEONARD B. SMITH,
Counsel for Irving Bank and Trust Co., as Trustee under a Trust Deed executed by Alonzo R. Peck, Amicus Curiae.

No. 88.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

MALCOLM E. NICHOLS, Collector of Internal Revenue of UNITED STATES for the District of Massachusetts,
Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of JULIA COOLIDGE,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR MASSACHUSETTS.

PETITION and Brief OF ISAAC B. LIPSON, AMICUS CURIAE

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TABLE OF CONTENTS.

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PETITION OF ISAAC B. LIPSON, AMICUS CURIAE

To the Honorable the Judges of the Supreme Court of the United States:

Now comes Isaac B. Lipson, of Chicago, Illinois, and prays leave to file his appearance as *amicus curiae* in said cause and says:

That he is attorney for the executor of the estate of Anna B. Austin, deceased, of Chicago. Anna B. Austin died in the year 1922. In the year 1903 she executed an irrevocable deed of trust transferring securities having a value of $1,600,000 to be paid to her two children

after her death. The government proposes to levy an estate tax of around $160,000 based on the inclusion in the "gross estate" of the value of the securities transferred in trust in 1903. The estate left by her is less than the proposed tax and the legatees are the surviving husband and certain relatives and friends other than the two children who are beneficiaries of the trust. The proposed tax will exhaust the estate leaving nothing for legatees and leaving a balance to be paid by the beneficiaries of the trust.

Respectfully,

Isaac B. Lyon

Amicus Curiae.

BRIEF OF AMICUS CURIAE, ISAAC B. LIPSON.

THIS BRIEF IS CONFINED TO A DISCUSSION OF THE CONSTITUTIONALITY OF SECTION 402 (c) OF THE FEDERAL ESTATE TAX ACT INSOFAR AS IT PURPORTS TO BE RETROACTIVE.

(This brief is intended chiefly as an analysis of the retroactive feature of the act, its purposes and its results, omitting a repetition of the citation and discussion of authorities amply set forth in the brief for defendant in error. The petition for leave to file this brief sets forth a statement of facts which is illustrative of the practical results of the retroactive feature of the act.)

We contend:

(1) That the tax insofar as it is retroactive is a direct tax levied in violation of Article 1, Section 9, Subdivision 4 of the Constitution.

(2) That it takes property of the taxpayer without due process of law in violation of the Fifth Amendment.

(3) It is not the exertion of the taxing power, but is the taking and confiscating of property, wanting in a basis for classification and producing gross and patent inequalities. The Fifth Amendment therefore applies.

I.

THE FEDERAL ESTATE TAX; AN EXCISE TAX ON RIGHT TO TRANSMIT PROPERTY BY DESCENT.

The federal estate tax is an excise tax. It is "a tax on the right to transmit or on the transmission at its beginning." *New York Co. et al.* v. *Eisner*, 256 U. S. 345.

In that respect it differs from the previous act which assessed the tax against the heirs and legatees; that was a succession tax and was said to be a tax on the right to receive. *Knowlton* v. *Moore*, 178 U. S. 41.

An excise tax is a tax "upon the performance of an act, engaging in an occupation or enjoyment of a privilege." 25 R. C. L. 236 and cases there cited.

II.

GROSS ESTATE, PERCENTUM, BY WHOM PAYABLE.

Under Section 402 (c) the tax is assessed upon a principal sum designated as the "gross estate." This principal sum is arrived at by adding to the net value of the true estate the value of all sums transferred or trusts created, intended to take effect in possession or enjoyment after the decedent's death. It includes trusts created *at any time prior to the enactment of the law.*

It is a graduated *ad valorem* tax and the percentum is determined by the two factors, the value of the decedent's estate and the amount of all prior transfers in trust of the designated character.

The tax, however (Sections 406 and 407), is required to be paid primarily by the executor and he cannot recover any part of it back from beneficiaries under the trust. He must exhaust, if need be, the entire estate for the payment of the tax. (Sec. 406, Regulation Article 81.)

III.

LIABILITY OF BENEFICIARIES OF TRUST.

It is provided that in those cases where the entire net estate is not equal to the tax upon the estate, then the remainder of the tax becomes a lien upon the "gross es-

tate" (including the property held in trust or delivered to beneficiaries) and the transferee, trustee, and each beneficiary is personally liable for such tax to the extent of the value of the entire property transferred to him. (Section 409, Regulation Article 87.)

The Government may elect which one or more of such persons it will hold for the tax. The person so elected must pay up to the full amount received by him, but such person (other than the executor or the administrator), may thereafter sue each other person similarly subject to the tax for his proportionate share. (Sec. 409.)

Example: X dies. A tax of $150,000 is assessed. The estate amounting to $25,000 is paid over in full to the Government. A, B and C are beneficiaries under a trust going into possession or enjoyment after X's death. E, F and G are donees of a gift *causa mortis*. The Government may compel B to pay the unpaid balance of $125,000 of the tax up to the full amount which B has received. B must pay. Then B may sue A and C and also E, F and G, severally, each for his proportionate share of the $125,000, and get it if he can. If any one of them defaults B is the loser of the defaulter's share.

IV.

THE NATURE OF THE TRUST ESTATE WHICH IS INCLUDED IN THE "GROSS ESTATE."

Any trust estate is included which is not intended to take effect in possession or enjoyment until at or after the donor's death. A trust created in 1903 (the *Austin Case*) would be included. In Article 18 of the Regulations the Government seems to consider that a trust wherein the income goes to the same person who ulti-

cannot be on "the right to transmit" the $25,000 estate. Nor can the $125,000 charge be an excise tax upon the donee's "right to receive." It may be all which the donee has received. And, why should the executor be required to pay the estate over to the Government for the donee's right to receive; and why should one donee or beneficiary be taxed for the right of another "to receive?" It cannot, therefore, be a tax upon the right to receive or the receiving.

Obviously, if this be an excise tax at all and not a direct tax on the property of the trust fund [see p. 12 (c)], then what is taxed (in addition to the right to transmit the true estate) is the exercise by the decedent in his lifetime, before the enactment of the law, of the right to transfer his property in trust, or the transfer. The same conclusion is arrived at by another illustration. X and Y die on the same date, each leaving an estate of $100,000. The Federal estate tax on the estate of X is $1,000. But Y having created a trust of $1,000,000 twenty-five years previously which comes under the Act, his entire estate is taken in payment of the tax. Both transmit equal estates. The tax on one is $1,000, on the other, $100,000. The additional $99,000 is a tax upon the transfer in trust, if it be an excise tax; or upon the $1,000,000 trust fund if it be viewed as a direct tax.

Quaere: Assume that Y left no estate. Would a tax be assessable? The Government contended in *Levy* v. *Wardell*, 258 U. S. 542, that it would. If that contention is correct, then the mask is off. Even if we might have an estate tax of $100,000 on the right to transmit $1,000, we surely cannot have a tax of $100,000 on the right not to transmit anything at all. The tax would necessarily be on the transfer in trust. But if in such event no tax is assessable the case of the Government is equally bad. For the beneficiaries of the trust are liable for $100,000

if the donor leaves an estate, however small, while beneficiaries of an equal amount are free from tax if their donor leaves no estate at all.

The tax is in fact either (a) a combination of estate and gift tax, the estate being primarily liable for the combined tax, and each donee being liable for a tax the amount and percentum of which is determined by other gifts and by the amount of the estate remaining; or (b) a combination of estate and direct tax, the direct tax being a tax upon the trust fund, though, anomalously, payable primarily by the decedent's estate.

VI.

THE DISPARITY AS BETWEEN ESTATES.

The illustrations which we have given under Subdivision IV are indicative of the disparity as between estates. We will take an additional illustration based upon the *Austin Case*. Assume the estate of X, the decedent, worth net $25,000; X during his lifetime transferred one million dollars in trust to take effect in possession and enjoyment upon contingencies other than his death, though perhaps, or even probably after his death. No federal estate tax is assessable. Assume a like estate of Y, the decedent, with like net worth and like trusts, but the trust funds to go into possession or enjoyment at or after his death, the estate is wiped out, taken in its entirety for the tax.

In no two estates of equal size will the rate or percentum of tax (in so far as Section 402 (c) applies) be the same. In no two estates where the donor made equal trusts will the rate be the same. In no two estates where the property of the decedent was equally depleted by transfers will the tax be the same, except where all transfers went into possession or enjoyment on the sole contingency of the donor's death.

On the unreasonableness of classification on this contingency of the donor's death, see also Subdivision X, page 19, XII, page 24, and XIII, page 26.

VII.

THE DISPARITY BETWEEN BENEFICIARIES OF TRUSTS.

Illustrative case: X creates a trust estate which comes within the Act, A and B, being the beneficiaries; C, the donee of a gift in contemplation of death. Y creates a similar estate, R and S being beneficiaries and T the donee of a gift in contemplation of death. X and Y both die.

Example (a): X leaves an estate sufficient to pay the tax. Y spends or loses his fortune and leaves an estate insufficient to pay the tax. A, B and C are free from tax. R, S and T must pay.

Example (b): A is a beneficiary of a trust estate of $10,000, B $100,000, C of a gift *causa mortis* for $200,000, all received prior to the donor's death. His estate is insufficient to pay the tax. The Government makes its levy on A, taking his entire trust fund. A seeks to sue B and C. A recovers from B; C is insolvent. A loses the share payable by C.

Example (c): X has made an additional trust, the income to his wife for her lifetime, then the principal to A and B. Y has made an additional trust, the income to his wife for Y's lifetime, then the principal to R and S. The percentum of tax of A and B is in the lower brackets, this additional trust being omitted. The percentum of tax of R and S is in the higher brackets, the additional trust being included. And this is without regard to who actually did or probably would receive the principal of the trust at an earlier date, without regard

to whether it was contemplated that the donor or the donor's wife would survive longer.

Illustrative case: X transfers a fund in trust, the income to be paid to A, his son, until B, his grandson, becomes forty-five years of age, then the income to be paid to B. The grandson is five years of age when the trust is made. Y makes an exactly similar trust, but with the provision that the principal should in no event be paid to the grandson until Y's death. The grandson of X is free from the tax. The grandson of Y is subject to the tax.

If any of the illustrative cases is subject to debate with respect to details, others can readily be selected which will not be subject to question. In any event the disparity as between beneficiaries is not proportionate to any difference in the sum by which the estates of X and Y are depleted by gifts. It is due either, (a) to the difference of the named contingency in which the principal takes effect in possession or enjoyment, in the one case the death of the donor, in the other case the death of another person or lapse of time, and utterly regardless of which contingency is further removed; or (b) the value of the donor's estate at the time of the subsequent date of his death dependent on the fluctuations of his fortune after the gift is made, his generosity, thrift or wastefulness; or (c) the amount of similar trusts, or gifts in contemplation of death, for the benefit of others; or (d) the solvency of other beneficiaries or donees and their accessibility for purpose of suit.

It will be noted that the interest of a beneficiary in a trust may have been mortgaged or assigned, used up long before the tax law was enacted. Yet he remains liable for the tax. Even after the enactment of the tax law he can make no reserve to meet his liability because it cannot be calculated until the donor's estate is administered.

VIII.

THE TAX IS A DIRECT TAX.

(a) The tax which must be primarily borne by the estate, or secondarily by certain beneficiaries of trusts, being in fact based upon ancient transfers in trust, is a direct tax in so far as the estates or the beneficiaries are affected. The transfers in trust might have been subjected to a tax at the time they were made, and such tax would then have been an excise tax, but now being levied against the estate or beneficiaries the tax is direct. Perhaps the best proof that this tax is a direct tax, is that it is not an excise. If it were an excise tax on the transmission of the estate, it would not be proportioned in percentum and amount to the sum conveyed by ancient deeds of trust. If it were an excise tax upon the succession, it would not be proportioned to the amount of the net estate; even if it were in the nature of an excise upon the privilege of making the transfer in trust prior to 1916 it could not be proportioned to the value of the estate of the donor as such value would be ultimately determined, subject to his fluctuating fortunes, at the time of his death. One reason that we must consider this tax a direct tax, is that it is definitely not an excise tax. Not being proportioned in such a manner as can be said to be a tax "upon the performance of an act, engaging in an occupation or enjoyment of a privilege" the tax is a direct tax.

(b) The tax is a direct tax upon the ground that the tax is exacted very much as a liability of the estate by reason of something which had been done by the decedent during his lifetime, *e. g.*, the transfer in trust.

(c) It is a direct tax on the property of the trust fund. We have said that it is inconceivable that the tax is on the transmission of the estate of the decedent,

since it contemplates that the tax may be 100 per cent or more of the value of the estate. And we discussed the tax therefore as a tax on the transfer in trust, and also on the succession, these being conceivably excise taxes. In truth, however, probably none of these three theories truly underlies the retroactive feature of the act. Probably the act was intended to tax simply the *property of the trust estates*, in addition to the decedent's estate; and inasmuch as that would be obviously a direct tax, and obviously void also because of arbitrary classification, the plan was adopted of calling it an estate tax; and, to justify the name, it was made payable in the first instance by the decedent's estate. One cannot but believe that it was the original intention to give the executor the right to collect a proportionate part of the tax from the beneficiaries of the trusts. Such a provision was made respecting beneficiaries of insurance policies. For whatever reason, the provision was not made respecting trust beneficiaries. Nevertheless it is clear that the tax was intended to be and is a tax on the property of the decedent's estate *and* on the property in the trust funds. In so far as it taxes the property of the decedent's estate it is justifiable on the ground that it is a tax on the transmission of a decedent's estate. In so far as it is a tax on the trust funds it cannot be justified, for in that respect it is simply a direct tax, doubly vicious in that the act requires the tax to be paid by persons who are not the owners of the fund. We think this theory of the tax is more nearly true than the theory that it is a tax on the act of the decedent during his lifetime in transferring property in trust. The latter comes more nearly within the definition of an excise. But the tax is levied with reference to the value of the trust fund at the time of death, which may be much higher or lower than at the time of transfer. Ap-

parently therefore it is the *property* at the time of death which is taxed. It is a direct tax on a vested property right.

(d) We think it will probably be conceded that Congress could not legally pass a law taxing by fixed or graduated tax, all persons living at the time of the enactment upon any transfer in trust made by such persons *at any time* prior to the enactment of the law. Obviously such a law might beggar kindly and benevolent people who have given away their fortunes, keeping only enough to supply the wants of advanced age. Even gifts to charities might be included, for such exclusion is but an Act of congressional grace; even under the present act not all charitable gifts are exempt.

If there can be any doubt about such a law being unconstitutional, there can be no doubt whatever about it if we further suppose that the percentum of a tax in the supposititious case is proportioned not to the value of the property transferred prior to the enactment, but to the value of the property transferred plus the net capital owned by the donor on the date *when the statute was enacted*. Being made proportionate to his then capital, it would clearly be a capital tax. Even though it might fluctuate with other factors, it would be a tax against the amount in proportion, among other things, to his capital. It would be a capital tax aggravated rather than ameliorated by other irrelevant circumstances. Of course a capital tax is a direct tax.

In what respect does 402 (c) differ from the foregoing supposititious case? In that it applies to estates. But the fiction that it is "the right to transmit" which is taxed is too flimsy for serious thought. The liability is upon the estate, but the tax is upon the transfer in trust, and in percentum and amount will not in any two conceivable cases bear the same ratio to the value

of the estate or the value of the Trust. The tax levied upon the estate therefore is a direct tax, previsely the same as a tax similarly arrived at if it had been levied against the individual during his lifetime. And if a man may not be taxed, perhaps despoiled and beggared by a tax during his lifetime upon a 25-year-old transfer, may Congress deprive him in whole or in part of the right to employ his remaining means to provide for wife or child, for the helpless and dependent. Who among us will not say: "I will give up all possessions and live in penury sooner than be deprived of the means wherewith to secure my wife from want, and to insure my child an education." Is not that the working principle of the life of every decent man?

Another view of this situation indicates that the tax is a direct tax. The executor stands in the shoes of the heirs and legatees with respect to so much of the estate as is in excess of the indebtedness.

Section 402c does not purport to tax the donor. But it requires a tax to be paid by the executor. The executor merely represents an interest, similar to a trustee. The executor is a fiction representing certain property rights and liabilities. As to property in excess of the decedent's liabilities the executor represents the legatees and heirs.

A tax against the decedent during his lifetime upon transfers made by him and at the time when such transfers are made would be an excise tax. But a tax against his heirs and legatees, or any other person for transfers made by the decedent during his lifetime is a direct tax. It may be proportionate, with reference among other things, to the nature and size of certain transactions of the decedent, but as to the person paying the tax, it is a direct tax. To put it in another way. The

tax against the estate is a direct tax though levied with reference to transactions which might have been subject to an excise tax. There can be no valid *ad valorem* excise tax against an estate, except as it is *ad valorem* of the estate, or at most properly transmitted *causa mortis* in connection with the transmission of the estate. It cannot be *ad valorem* of other gifts, trusts, expenditures or transactions of the decedent, especially if these be prior to the enactment. The tax may be computed with reference to other transactions, but as to the estate the tax is a direct tax. Not having been levied as a direct tax in proportion to population it is unconstitutional.

We have here a law which makes it impossible most of all for the generous and benevolent who have disposed of the bulk of their fortune, to ever again accumulate enough to provide for surviving wife or child or charity—possibly a wife or child of later years—except as to those to whom transfers have already been made. A man owning one million dollars, and giving before the enactment of the statute $900,000 in trust for his children upon his death (or for that matter for charitable purposes not coming within the exemption of the statute) and retaining $100,000 for himself, cannot make provision for wife or after born child. This is not fancy, it is the Austin case cited on page 1, the gender only being changed.

Can this classification of estates for taxing purposes be deemed to be within the rule of reason? And is not the mind of man appalled that under pretext of law, of uniform rule, these results should flow from ancient deeds, dependent upon the accidental and immaterial selection of contingencies wholly irrelevant to any conceivable tax purposes, often the haphazard suggestion of a lawyer or scrivener, for the temporary safeguarding of gifts!

From the standpoint also of the beneficiaries of trusts, the estate is a direct tax. In no sense is the tax proportionate to the amount of the succession, excepting that it cannot exceed 100 per cent of the amount received. It is an unescapable liability for the payment of money in no way proportioned to any privilege exercised or enjoyed by the beneficiary.

The Government has contended, and will probably contend in this case, that even though the retroactive feature of Section 402 (c) be void as against beneficiaries of trusts, it is valid as against estates. We do not think this argument tenable. This is not because heirs and legatees may complain on the ground that after the confiscation of their inheritance the Government fails to pursue trust beneficiaries. It is because the arbitrary classification applies alike to estates and to trust beneficiaries, and hits estates first. This arbitrary classification is not only as between trust beneficiaries *inter se*, but primarily as between estates *inter se*, and between estates and trust beneficiaries. The basic vice of the classification is that it takes the corpus of the estate as a tax for something *dehors* the estate, whether it be on the *transmission* in trust, or on the succession, or on the vested property of the trust. The retroactive feature of the act cannot on any principle, nor on the common sense of the situation, be held valid up to the point of the confiscation of the entire estate, and invalid from that point on.

IX.

THE TRUE RULE RESPECTING CLASSIFICATION.

We have discussed the inequality and discrimination of the tax as between estates, legatees, *cestui que trusts*, and donees, and the unreasonableness of the classification which the law creates.

Classification for the purpose of taxation must necessarily be a segregation of kinds and persons with reference to characteristics which are relevant to the purpose of taxation.

The difference in the characteristics between the kinds of trusts which are taxed and those free from tax, and the classes of persons taxed and those free from tax under Section 402c is utterly irrelevant. It constitutes, therefore, the taking of property without due process of law. *Schlesinger v. Wisconsin*, decided by U. S. Supreme Court March 1, 1926, 43 A. L. R. 1224.

> *Bruskober v. Union Pac. Ry. Co.*, 240 U. S. 1, See pp. 24, 25.

We believe that the most persuasive statement in favor of the tax was that made by the Government in the Frick case:

> "what is really taxed is the passing of the property because of the death of its owner, whether his death follows, is co-incident with or precedes the consummation of its passing."

Possibly a tax law based on this benign formula could be worked out. The retroactive feature of 402 (c) is not claimed to be void because it violates some abstract and eternal principle, but because the Act is so drawn that it rests upon an arbitrary classification, and results in the grossest inequality. It taxes primarily the wrong person, to-wit, the executor, and secondarily, the hand of the law reaches out and seizes whom it may, among the beneficiaries of trusts, leaving the victim to seek redress from others similarly situated, if he can obtain it. Under guise of a tax on the transmission of estates, it really enforces exactions based upon ancient deeds, and these are selected in a haphazard fashion which seems to have no relation to the purposes of taxation.

X.

THE PURPOSE AND INTENT OF THE ACT.

It was the obvious intention of the act to obtain revenue by taxing transfers made before Congress began to tax successions or estates. It was intended to recoup for transfers which had depleted estates. Obviously it was believed that Congress could still reach the undistributed portion of the property previously given away by parents to children and family. Probably also Congress intended that the tax should fall on the property which had been distributed. In Section 402 (f), which includes in the gross estate the proceeds of life insurance policies, a provision is made that the beneficiary of the policy should pay to the executor his pro rata share of the tax. The provision is crude and inadequate; but though the mechanics of the section are bad, the intent is reasonable. However, the framers entirely overlooked the fact that the same reasoning should apply to other persons who receive property from the decedent otherwise than through the executor. The failure to perceive this fact accounts in part for the unreasonableness of the classification for taxing purposes as between estates and beneficiaries of trusts and the consequent appalling inequity in the results.

To heirs and legatees of estates which are wholly wiped out by the tax (and this is contemplated by the very terms of the act, and has occurred in the Austin case) the devasting exactions of the Government have the appearance not of tax, but of tribute—a hostile force seizing and confiscating property which happens to be within reach, under pretext of law, which the common sense of men recognizes as unrighteous and unreasoning; disaster has overtaken them for no man's sin, no man's want of foresight. Their ancestor's very wis-

dom has been their undoing, his plans have been defeated with an irony usually attributed not to law but to haphazard fate.

As to trusts effected or transfers made after the enactment of the law the court might possibly say as it did in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, p. 349:

> "As to inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes."

But such reasoning does not apply to irrevocable transfers made before the enactment of any estate or gift tax.

XI.

THE MEASUREMENT THEORY.

This theory, advanced by the Government in similar cases, notably the Frick case, is in substance that the tax is not upon the prior transfers in trust, but upon the transmission of the estate, and that it is only the *measure* of the tax which is affected by the prior transfers in trust. The Government has customarily cited certain cases supporting the principle that the *measure* of the tax may be determined by "extraneous circumstances," other than the privilege or the property which is taxed. We shall not discuss the general principle thus invoked. The question is, can *this* tax be justified on *this* principle.

We have before us a specific statute. It makes definite reference to the "extraneous circumstances" which affect the tax. It contemplates by its very terms that the tax may be greater than the net estate, and provides how the excess of the tax shall be collected, *e. g.*, from beneficiaries of trusts to be selected by the Government

The principle of the measurement theory must be analyzed with reference to *this* statute to determine whether it is applicable.

What is meant by the "measure of tax"?

A. By "measure" is meant, what? We are not interested in definitions but in analysis. By "measure" must be meant one of two things, either the rate or percentum of the tax, or the aggregate amount of the tax.

It cannot mean rate because the statute contemplates by its terms that the tax may exceed the estate, that is, that the rate may be more than 100 per cent. In the Austin case, it would be over 500 per cent.

Also the rate or percentum when ascertained is not to be applied on a principal sum representing the value of the estate in the hands of the executor from whom the tax is primarily collectible. On the contrary, the rate when ascertained is to be applied to a principal sum which contains other and usually predominant factors, to-wit: other trusts, life insurance policies, etc. Obviously by "measure" cannot be meant rate or per centum.

By "measure", therefore, must be meant amount—that is, the gross sum of money constituting the tax; if that is true, the principal is clearly inapplicable because the amount thus considered is *the tax*, not the *measure* of the tax.

B. Even where the rate of tax is less than 100 per cent of the estate, the Government is not aided by reliance on the principle invoked. The same objections which have been urged against the tax apply to the *measure* thus adopted. If "classification for purposes of taxation must rest on some reasonable distinction" (*Schlesinger* v. *Wisconsin*, 43 A. L. R. 1224), the *measure* of the tax surely must rest upon some reasonable principles. The "measure" must be established on a reason-

able and not arbitrary principle just as the tax must be based on a relevant and not an arbitrary classification. It becomes a question, therefore, merely of transposing what has been said respecting the want of a relevant classification of the tax into a discussion on the want of a reasonable rule by which the "measure" is established. The question still is whether the "extraneous circumstances," *e. g.*, prior transfers in trusts of a designated character, are reasonable and relevant with respect to the "measure".

C. The measurement theory also is applicable because it assumes that the tax is *on* the net estate in the hands of the executor, or *on* the act of transmission to heirs and legatees. It is not possible that a tax should be *on* an estate and exceed the estate; nor *on* the transmission of an estate and exceed the value of the estate. Therefore, it is clearly within the contemplation of the statute that the tax is not only on the estate in the hands of the executor or its transmission, but also that the tax must be either (1) on the *property* of the trust (which would make it a direct tax); or (2) on the succession (which it is not, since it is not a succession tax, is not payable primarily by the successor but by someone else, and is proportionate not to the amount received by the successor but to a principal sum including the value of the remaining estate, the amounts obtained by others through other trusts, etc.) or (3) on the transfers in trust of the class designated by the statute.

Clearly it is this latter, *together with* the transmission of the net estate, which is consolidated and taxed, or it is simply a direct tax on the *property* in the trust fund plus a tax on the transmission of the decedent's estate. In either case the measure of the tax, therefore, is not determined by any extraneous circumstances. The "transmission" of the true estate together

with the property in the trust funds (or the transfers in trust) are being taxed, and all of these are within the contemplation of the statute, and none of these is extrinsic.

The Government contends that only in certain cases will this act work so serious a hardship as in the Austin case, and that absolute equality is impracticable in taxation. The answer is that the statute *contemplates* the entire wiping out of the estate, after which the Government shall proceed against the beneficiaries of trusts in the fashion described. This law cannot be said to be necessary in order to prevent the evasion of inheritance taxes or estate taxes. In so far as it is retroactive it affects conditions which negative the idea of evasion; there was no law to evade. Moreover, as was said in *Schlesinger v. Wisconsin*,

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A may be required to submit to an exactment forbidden by the constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated, they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever. * * * A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

XII.

THE ARGUMENT THAT THE TRANSFER IN TRUST IS TESTAMENTARY IN CHARACTER.

It has been contended by the Government that transfers such as are taxed are in the nature of testamentary transfers, and therefore may be made subject to death duties. One of the valid objections to the classification is that they are not in the nature of testamentary transfers.

(a) The income of the trust estate until the donor's death may not be reserved at all to the donor; it may go to a third person; it may be allowed to accumulate. In the case of a testamentary disposition, the income remains with the testator.

(b) The transfer in trust also differs in this all important feature from a testamentary act, in that it is irrevocable. The principal, the corpus of the trust, is irretrievably gone, once the transfer has been effected. This destroys its testamentary character, and gives it the character of a gift. The distinction is not academic, it is of vital practical importance; for such a trust having been made (before there was any estate or inheritance tax law), it was irrevocable, and it permanently depleted the property of the donor; only the remainder of his property was subject to testamentary distribution. If this remainder may be taken by the Government, his testamentary right becomes a fiction. The law intrudes at a point which makes it impossible for the carrying out of *any* testamentary plans. To ignore this distinction is to ignore the actualities. It is an attempt to justify the classification by verbal subtleties with no regard for those considerations which count in the lives of men. These transfers in trust in their true bearings are gifts. They deplete the donor's property holdings irrevocably,

and eventually deplete his estate, *precisely like other gifts.* And when a retroactive tax is levied, it is not upon various aspects of a testamentary disposition, it is upon the irrevocable gift made by the ancient deed of trust, and also upon the testamentary disposition. The retroactive tax feature of the statute *contemplates* that after the gift is made, the right of testamentary disposition shall be curtailed or entirely taken away. If a man's plan has been to make provision for wife or certain other dependents by a transfer in trust, and subsequently for children or other dependents by a testamentary disposition, his entire plan is defeated by the retroactive feature of the law, because the testamentary disposition is frustrated.

Worse, it is precisely those who are left the "mite" whose mite is taken from them, and those who are left the feast whose feast is least disturbed. And the very oppressiveness of the Act is further aggravated by the inequality of the oppression, by its sinister discriminations.

Any gift, even a gift *in presenti* or *inter vivos* may be spoken of as testamentary in character, in the sense that it is intended for the purpose of taking care of certain relatives or dependents, the donor having in view that he will provide for other relatives and dependents by testamentary bequest; but the gift is not rendered thereby testamentary in character in the sense that it is a will or testament. A gift in trust, such as the statute undertakes to cover retroactively, depletes the property of the donor irrevocably, just as any other irrevocable gift depletes his property, and a law which taxes one gift and not the other is discriminatory. From the standpoint of taxation, what difference does it make if the possession and enjoyment is fixed upon the occasion of the death of the donor, or upon the occasion of

some one else's death, or marriage, or birth, or the mere passing of time. All gifts alike, and all trusts alike, deplete the property of the donor or trustor, and presumably his estate. But these transfers in trust are in character gifts, not testaments, and their character is not changed by the nature of the occasion upon which they go into possession or enjoyment. The gift in trust may contemplate that the donor will follow it up by a testament. This retroactive law cannot make a testament out of a gift; it can only make a nullity out of the testament which may follow. A tax law may perhaps tax testamentary gifts upon any classification which the tax law may adopt, and with broad discretion, because after all a testament is revocable, and wills may be made to fit laws. But irrevocable gifts made by ancient deeds, whether of the entire interest or limited interest, must be classified as gifts in accordance with all the dictates of reason, which after all, means the dictates of justice.

XIII.

THE REASON FOR SELECTING THE PARTICULAR KIND OF TRUST DESIGNATED IN THE STATUTE.

The contingency of the testator's death is selected not because it is a reasonable classification with reference to taxation, but because it is a convenience with reference to collection. Convenience of collection may, of course, be considered as a reason for *adopting* certain classifications; but what the courts have called "reasonable classification" cannot be utterly ignored in order to simplify collection. Collection can frequently and easily be simplified if the taxpayer's rights are ignored. The selection of *all* gifts made within six years (as in *Schlesinger* v. *Wisconsin*), or ten years, or twenty years, prior to the decease, would not be nearly so irrelevant

to death duties nor so arbitrary and unreasonable as the selection of this one class of gifts in trust. These classes of trust are made the target of the tax because it is assumed that they can be hit. Even in that respect, the law is a failure for the remainder or reversion may be wiped out before the testator's death by transfer, bankruptcy or the like. And after adopting a bad classification for the purpose of *computing* the tax, the law follows up with an even more unreasonable classification with respect to the persons who are required to pay the tax, all in an attempt to simplify the collection of it.

But manifestly it is because these classes of trusts happen to be exposed that they are taxed, and in so far as the net estate is in whole or in part appropriated by the tax, it is clearly because the amount of money in this class of trust lends itself to easy discovery and computation. These transfers are selected because they are frequently accessible, not because they have any different result respecting the depletion of estates than other transfers; these transfers are selected, to use the words of this court in *Schlesinger* v. *Wisconsin*, "without regard to actualities, while like gifts at other times are not thus treated; there is no adequate basis for this distinction." (The reasoning of the majority opinion is not in this respect in conflict with the reasoning of the dissenting opinion.)

XIV.

THE APPLICATION OF THE FIFTH AMENDMENT.

The Fifth Amendment may not be applicable to Government taxation. But as said by Mr. Chief Justice White in *Brushcber* v. *Union Pacific Railroad Company*, 240 U. S. 1 pp. 24, 25, this doctrine has no application where "although there was a seeming exercise of the

taxing power, the Act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of the taxing power, but a confiscation of property, that is a taking of the same, in violation of the Fifth Amendment; or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent equality as to inevitably lead to the same conclusion."

We do not believe that under the Constitution as it now stands, a Federal Act confiscating all inheritances could possibly be constitutional. Likewise we do not believe that any Act can be constitutional which by its very terms contemplates the confiscation of the entire estate by reason of the creation of a trust fund by the decedent at a date prior to the passage of a first federal inheritance or estate tax law. Nor that an Act can be constitutional which contemplates that the entire fund left in trust for one beneficiary can be confiscated to pay a deficit resulting from the insufficiency of the estate, leaving the beneficiary only a partial remedy, if any, by suit, against other beneficiaries similarly situated. Further, we do not believe that even where the exaction of the law is less than complete confiscation, an estate can be impaired by way of taxation, merely because the decedent prior to the passage of the first Federal Inheritance or Estate Law, created a trust; and such a tax law is even more clearly void since it selects out of all gifts, presents, transfers and transactions which may deplete an estate, the single kind of transaction which constitutes a trust coming into possession or enjoyment upon the death of the person creating the trust. Such a transaction does not tend to deplete an estate more than any other gift or trust. As was said by the Supreme Court of Wisconsin in *Schlesinger* v. *Wisconsin*:

> "Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event"

and as was said in the same case by the United States Supreme Court:

> "The court below declared that a tax on gifts *inter vivos* only could not be laid so as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of the opinion that such a classification would be plain conflict with the Fourteenth Amendment."

XV.

THE DOCTRINE THAT INCOME AND EXCISE TAXES MAY BE RETROACTIVE.

Section 402 (c) is levied as an excise tax. It is that if anything, but it is difficult to designate its character. The underlying hypothesis is that it is an estate tax. In fact, however, it taxes the succession if the estate is insufficient; but the succession is taxed with reference to the principal amount of the remaining estate and of the succession to others, and the tax itself is a tax upon transactions by the decedent which constituted a trust of a certain designated character. In so far as it is a tax liability of the estate, it is not proportionate to the estate; in so far as it is a tax liability of the successor, it is not proportionate to the succession, and in so far as it is a tax upon a transaction (the transfer in trust) it is not proportionate to the transaction. It is not astonishing that there are no precedents in point on the question of whether a tax of such a nature may be retroactive. It is readily conceivable that some kinds

of income or excise taxes may lawfully be retroactive, while other kinds may not.

In a note appended to the report of *Schwab* v. *Doyle*, in 26 A. L. R. p. 461, is a collection of all state cases bearing on the constitutionality of the retroactive succession taxes. It has reference to the constitutionality of a tax upon a succession after enactment under a deed of trust executed before enactment. The weight of opinion is that such an act is unconstitutional. Yet these cases all differ from the act in question in the following respects: (a) They treat of statutes which tax the succession only. (b) They are payable by the beneficiary of the trust, gift or transfer, not by anyone else. (c) The rate or percentum is not based upon the value of the estate remaining at the time of the donor's decease, but upon the amount of each donation or trust established for such beneficiary. (d) The tax resulting from any one succession is not dependent upon anything save the value of the property which the donee acquires. (e) The tax does not attach to the giving, but to the receiving, and no property is taxed except that which is received by the person taxed.

The retroactive feature of Section 402 (c) differs in that: (a) It does not tax the succession primarily, but taxes the estate upon a principal sum which includes the amount of the succession. (b) The tax is payable primarily by some one other than the beneficiary. (c) The rate or percentum is based upon a number of factors including the value of the estate remaining at the time of the subsequent death, and the amount of other trusts created. (d) The tax resulting from any one succession is in no way proportionate to the amount which the donee acquires. (e) The tax is levied upon the giving, and primarily is payable by some one other than the recipient.

Even the minority cases, therefore, which uphold retroactive succession tax laws are not in point.

The case at bar therefore comes to this court without legal precedent supporting it, excepting the general doctrine that income and excise profit taxes may be retroactive, and this doctrine we will briefly discuss.

There are few, if any, legal doctrines which can be said to have no limitations in scope, and which in the matter of time can endure forever unmodified. The doctrine that an income or excise tax law may be retroactive was established at a time when taxes were relatively small exactions by the Government; it was applied in a series of cases wherein it was comparatively innocous, and led to no grievous wrong nor obvious confusion or discrimination. The doctrine is now facing the court in a situation altered in two respects.

First, in respect of magnitude. Taxes are no longer trivial; the Government is a substantial partner in every business enterprise and estate, often in individual transactions, of magnitude. All business is conducted with a view to Government exactions and interest as fixed by the Government itself in its revenue laws. By retroactive legislation the Government may render the wisest business transaction ruinous, innocent and even benevolent acts disastrous.

Second, in respect to time. In adjudicated cases respecting excise and income taxes in Federal courts, retroactive tax laws are considered which apply to recent events and current accountings. In Section 402 (c) the Government has pressed the doctrine to its limit, the period of time is "at any time heretofore" and the obvious result in practice is necessarily confusion and discrimination from which the common sense of men recoils.

There must surely be limitations to the doctrine. Just as in the matter of amount, a tax must be reasonable (to the extent at least of not being confiscatory), so in the point of time a retroactive tax must be reasonable.

Assume the enactment in 1925 of laws: (a) Taxing all shipping carried during the World War. (b) Taxing automobile manufacturers 20 per cent upon all cars sold since 1914. (c) Taxing distillers 10 per cent on all spirits distilled since 1914. (d) Taxing real estate transfers since 1914. (e) Taxing all tobacco grown during the Spanish-American War.

These illustrations are no more extreme than a tax on an irrevocable trust made in 1903 (the *Austin Case*). No more so than Section 402 (c) which renders prosperous estates insolvent, leaves penniless the natural objects of the bounty of deceased persons, and subjects the beneficiaries of quarter-century-old gifts to ruinous exactions, proportioned not even to the gifts received by them, and dependent upon the fluctuating fortunes of their benefactor. As a rule the gift was made to secure the donee against those very fluctuations of the donor's fortune. Even in the matter of percentum, the illustrative cases are not extreme. An estate may be confiscated in its entirety; a donee may be taxed an amount equal to one hundred per cent of the gift received.

The question is, is the doctrine that a tax law may be retroactive, without limitations? If there be a limit, it is well within the wide and wild frontiers of Section 402 (c).

This court and other courts have upheld penal statutes on the ground that though it may be unreasonable to apply them in certain cases, yet they may be applied within the rule of reason. This position has been taken by the courts with reference to the penal statutes involv-

ing questions of negligence, and with reference also to unlawful combinations in restraint of trade, etc. Surely a legal doctrine though established, may likewise be upheld as sound with the limitation that it be applied within the rule of reason. So this doctrine that a tax law may be retroactive, may be upheld, but with a modification that it be reasonably applied. We would say that a retroactive tax law to be upheld must be reasonable in principle and obviously enforcible with uniformity in practice. Judged by any such standard, Section 402 (c) in so far as it purports to be retroactive, is unconstitutional, based upon entirely irrelevant classification, discriminatory, and incapable of uniform enforcement, and therefore violative of the Fifth Amendment.

Amicus Curiae.

Supreme Court of the United States

October Term, 1929

No. 88

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR

vs.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF ACCOMPANYING MOTION

Supreme Court of the United States

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And now come the undersigned and say that they are of counsel of record in a suit now pending in the District Court of the United States for the District of Massachusetts; namely, Arthur D. Hill, surviving Executor of the will of Peter C. Brooks *vs.* Malcolm E. Nichols, Collector of Internal Revenue of the United States for the District of Massachusetts; that said suit of Hill, Executor *vs.* Nichols is one to recover an additional estate tax paid by the plaintiff to the defendant of $1,166,617.27 and that said suit of Hill, Executor *vs.* Nichols involves in most respects the same questions as are involved in the above entitled cause of Nichols *vs.* Coolidge, and particularly involves the question of whether or not that part of the estate tax contained in the Revenue Act of February 24, 1919, is constitutional which includes in the value of the gross estate of a decedent the value of a trust estate created before the passage of that Act.

WHEREFORE the undersigned respectfully move that they be granted leave to file the accompanying brief as *amici curiae*.

ARTHUR D. HILL.
RICHARD H. WISWALL.

SUPREME COURT OF THE UNITED STATES

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BRIEF OF ARTHUR D. HILL AND RICHARD H. WISWALL, AMICI CURIAE

SUBJECT INDEX

TABLE OF CASES

THE OPINION OF THE COURT BELOW

The opinion of the court below, the District Court for the District of Massachusetts, was delivered in the form of a charge to the Jury and is reported in *Coolidge* v. *Nichols*, 4 F. (2d) 112. R. pp. 19–28.

JURISDICTION OF THIS COURT

1. Date of Judgment to be reviewed April 3, 1925. R. 7, 8. Writ of error allowed on same day. R. 28.

2. The ruling made by the lower court which is the basis of this court's jurisdiction is that the Act of February 24, 1919, 40 Stat. 1057, commonly called the Revenue Act of 1918, as applied to the trust created by Julia Coolidge is void because not an exercise of any power granted to Congress by the Constitution of the United States. R. 27.

3. The Statute giving this court jurisdiction by writ of error to the judgment of the District Court is Judicial Code, sec. 238 as amended by Act of January 28, 1915, sec. 2, 38 Stat. 803. The Act of February 13, 1925, taking away the jurisdiction, did not become effective till May 13, 1925 and cases like that at bar were expressly saved. Sec. 14; 43 Stat. 936, 938, 942.

4. In *Lewellyn* v. *Frick*, 268 U. S. 238, the jurisdiction of this court was the same as in the case at bar.

STATEMENT OF THE CASE

Julia Coolidge, July 29, 1907, joined with her husband in transferring by an instrument in writing certain real and personal property to trustees, and on the same day those trustees executed a declaration of trust respecting the property so conveyed. R. 19. The declaration is set out in the Record pp. 9 to 11. In substance the declaration of trust gave the trustees full power of management and provided that the net income therefrom should be payable 3–7 to Julia Coolidge and 4–7 to her husband, J. Randolph Coolidge

> "so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust property among the following persons who are children of said J. Randolph Coolidge and Julia Coolidge, viz.: J. Randolph Coolidge, Jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be

entitled to take his intestate property under the statute of distributions in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share." Record pp. 19-20.

On April 6, 1917, Mrs. Coolidge and her husband by writing transferred to their five sons, in equal shares, all their interests in the trust that had been established, and all their right to receive income therefrom, including additions thereto and any accrued income which had not already been paid over to them, and by the same writing requested the trustees to pay the income from the trust to those five sons in accordance with the written assignment. Record p. 20.

On May 18, 1917, Mrs. Coolidge conveyed to the five sons two parcels of real estate in Massachusetts taking back a lease for the term of one year at a rent of one dollar with the privilege of renewing the same from year to year unless written notice should be given by either the lessor or the lessee at least a month before the end of the original term or any renewal thereof. The conveyance of these two parcels of real estate was not made for any consideration. Record p. 20.

Mrs. Coolidge died January 6, 1921. R. 21. The defendants in error are executors of her will and paid an estate tax upon a net estate of over $100,000. R. 21. The Commissioner of Internal Revenue increased the gross estate by adding thereto $432,155.35, the value as of the date of the death of Julia Coolidge of that part of the trust property which she had conveyed in trust, the actual property composing the trust having, by change of investment, become materially different from that original transfer by Mrs. Coolidge. R. 21. The Commissioner of Internal Revenue also included in the gross estate the value of the real estate conveyed by Mrs. Coolidge to her sons on May 18, 1917. R. 21. This action of the Commissioner of Internal Revenue imposed an additional tax upon Mrs. Coolidge's estate of $36,799.38 for which sum, with interest, judgment was rendered for Mrs. Coolidge's executors, the defendants in error, by the court below, R. 8. The trial judge ruled, R. 28, (see ruling 6, requested by the Collector of Internal Revenue R. 17) that the trust created by Mrs. Coolidge in her lifetime was intended to take effect in possession or enjoyment at or after her death, and that the value of the interest with respect to which she created such trust was, under the terms of the Revenue Act of 1918, Section 402 (c), included as a part of her gross estate, R. 24-25; and further ruled that so construed the Revenue Act of 1918, Section 402 (c) was void under the Constitution of the United States as applied to the trust

created by Mrs. Coolidge. R. 27. The court, as requested by the plaintiffs below, R. 17, 18, 27, ruled that Congress had been granted no power by the Constitution to enact the provision of the Revenue Act of 1918 which applied to Mrs. Coolidge's trust, that the tax before the court was repugnant to the fourth clause of Section 9 of Article I of the Constitution as a direct tax, and that the estate tax of the Revenue Act of 1918 so applied to Mrs. Coolidge's trust was repugnant to the Fifth Amendment of the Constitution of the United States. Judgment having been entered for Mrs. Coolidge's executors, a bill of exceptions was allowed April 3, 1925, R. 28, and a writ of error allowed the same day. R. 28. By his assignments of error the Collector of Internal Revenue raises the question of whether the court was right in its rulings with respect to the constitutionality of the estate tax of the Revenue Act of 1918, and whether the court was in error in eliminating from the gross estate of Mrs. Coolidge the parcels of real estate conveyed by her to her sons May 18, 1917. R. 29.

This brief filed by the undersigned as *amici curiae* is directed to the constitutionality of the Revenue Act of 1918 as applied to trusts created before its passage, and to a possible construction of the Act by which the question of its constitutionality may be avoided.

SUMMARY OF ARGUMENT

1. As construed by the court below R. 24-28, the estate tax of the Revenue Act of 1918 is, as applied to trusts created prior to its enactment and intended to take effect in possession or enjoyment at or after the death of the creator of the trust, unconstitutional for the following reasons:

(a) The tax is not really a duty, impost or excise within the first power granted Congress in Section 8, Article I of the Constitution of the United States.

(b) If a tax at all the estate tax as applied to Mrs. Coolidge's trust is a direct tax requiring apportionment under the Constitution.

2. In view of the foregoing considerations the court may well construe the estate tax in the Revenue Act of 1918 as not applying to any trust created before its passage when the creator of the trust parted at that time with the entire interest in the property transferred by him, whether or not the trust provided for estates limited on his death.

PART FIRST

The constitutionality of the Estate Tax as applied to trusts created prior to the 1918 Act and intended to take effect in possession or enjoyment at or after the death of the creator of the trust.

PRELIMINARY CONSIDERATIONS

Long before the World War and before Congress has considered imposing any taxes on property passing from one person to another by reason of death, an owner of property creates a trust, the income of which he is to have for his life, and the principal of which on his death, another is to receive.

Congress, in 1919, many years after the creation of this trust, passes an act imposing a tax "upon the transfer of the net estate of every decedent dying after" its enactment. *Y. M. C. A. v. Davis*, 264 U. S. 47. The man who made the trust then dies. Assume that the act is construed as saying that

> (1) the net estate transferred shall consist of what the man leaves behind him plus the trust property at its value when the man dies. Sec. 402c. (The act says that the trust property is to be included in the gross estate but, of course, that includes it in the net.)
> (2) the rate of tax shall depend on the sum of the items composing the net estate, Sec. 401.
> (3) the tax shall be paid by the man's executor or administrator, if he has any funds to pay it with. Sec. 407.
> (4) if the executor or administrator does not or cannot pay the tax, the trustee of the trust is personally liable therefor. Sec. 409.

And that the result of the combination of (1), (2), (3), and (4) is that there may or may not be a tax on the property in the trust depending on whether or not its creator survives the enactment of the statute and on whether or not his executor or administrator has any or sufficient funds to meet the tax; and that if the executor or administrator has funds the rate at which he pays depends on what funds he has and what the trust is worth.

The question then arises as to whether such a transfer tax, where the value of such a trust is laid hold of for the purpose of determining what an executor primarily or a trustee secondarily shall pay to the government, is within the powers granted Congress by the Constitution.

ARGUMENT

Of course, the tax must be sustained as a duty, impost or excise, if at all. Constitution, Article 1, sec. 8, clause 1. Of course, also, if it is in reality a duty, impost or excise, and is uniform throughout the United States, it is within the granted powers and does not violate the Fifth Amendment. The question therefore is: Can this exaction from an executor, or if his pockets are empty, from a trustee, be deemed really a tax on what Congress says it is taxing, namely, "The transfer of the net estate of" a decedent or is it an effort of Congress to take property, the transfer of which originally it conceivably might have taxed, which is not part of the net estate of a decedent at all. In other words is the taxing of the property of a trust, of the character just described and created before the taxing act was passed, an impost "naturally and reasonably adapted to the collection of a tax" on the transfer of the net estate of a decedent "*dying after the enactment*" of the law? See *Child Labor Tax Case*, 250 U. S. 20 at p. 43.

If it is not, it is either a direct tax which must be apportioned or an exaction which can in no way be deemed a tax.

WHAT IS THE "NET ESTATE OF A DECEDENT"?

A layman would say, in answer to the foregoing question, that it is what remains of the property of a dead man after paying his debts and all administration expenses. If pressed a lawyer might or might not include in the estate property over which the deceased had exercised a general power of appointment and if consulted by a creditor, the lawyer might look round to see if the deceased had made any voluntary conveyances for the purpose of avoiding the payment of his bills.

No layman or lawyer would or could include in the estate of a deceased person property which the decedent, when free of debt, years before his death, transferred to trustees for his own benefit for life with remainders over. Can Congress for purposes of taxation include in the net estate of a decedent property which neither the common law, nor the ecclesiastical law as far as we are aware, nor the statute law has ever made subject to the claims of creditors of the deceased.

What is the situation before Congress?

The country needs money and Congress must find new objects of taxation. It proposes to tax the "net estates" of persons who may die after Congress has acted. Of course, when Congress has acted, many souls will seek a means to escape from this world with their property untaxed. Congress must so see to it with respect to persons dying after the act passes that such

an escape is impossible. This Congress does in two or perhaps three ways. *First:* It includes in the estate property given away in the future "in contemplation of death," *i.e.* with death directly in view. *Second:* It includes in the estate future transfers in trust in which the settlor of the trust controls the devolution of property after his death. Property of these two classes must be included in the net estate or escape from the estate tax will be easy. The inclusion of these classes is a precaution "naturally and reasonably adapted to the collection of the tax." *Third:* It may include the exercise of general powers on the basis that a general power is practically the equivalent of ownership.

To put the foregoing paragraph in another way. An estate tax law must prevent conveyances in fraud, so to speak, of the tax law, just as the common law prevents a debtor by conveyances escaping his just debts. See the discussion in *Keeney* v. *New York*, 222 U. S. 525, 535, 536; and also *Carter* v. *Craig*, 77 N. H. 200.

But conveyances in trust, no matter what the limitations, made before the passage of the estate tax law, were not made, leaving state laws as we must out of consideration, with any estate or succession tax in mind. They were effected for any number of prudential reasons, as for example, ridding the makers of the care of property or the fear of becoming mentally incapable. They were not created for the purpose of and had no substantial relation to escaping the incidence of federal estate taxation. By their very terms they ceased to be a part of the estate of those creating them. Certainly they formed no part of the estates of those who died *before* the passage of the Act of 1918. The conclusion, accordingly, is irresistible, that Congress inserted in the Revenue Act of 1918 the clauses with respect to transfers and trusts made or created before the passage of the act for the simple purpose of getting some more money into the Treasury. The resulting revenues were not really estate taxes at all but, if not direct taxes, exactions on past transactions having no natural relation whatever to the successful imposition of estate taxes on the property of those who happened to survive the passage of the Act of 1918. All this is carefully pointed out by Brewster J. in *Coolidge* v. *Nichols*, 4 Fed. (2d) 112 at pp. 116-117.

And it is important to note the language of Section 409 which declares:

> "If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a

fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax."

This language makes it clear that the tax is conceived by Congress not as one on the transfer of the true net estate measured, in part, by the trust but as a tax "in respect" to the trust itself upon which, under certain circumstances, the government has a lien. In other words, under certain circumstances, there is a tax imposed directly on the trust. The tax is so evidently a direct tax on property that the draughtsman unwittingly says so. Even without the express language of section 409, the effect of the statute is, if the executor does not pay the tax, to tax the trust. This is made plain by *Frick* v. *Pennsylvania*, 268 U. S. 473, 494–495.

Can a state by statute subject to the payment of the debts of a deceased a trust created prior to the passage of the statute and so limited that estates come into possession or enjoyment on the death of the creator of the trust.

The distribution of property on death is within the control of the states. Congress has nothing to do with it. *Knowlton* v. *Moore*, 178 U. S. 41, 56. Accordingly one way of testing whether Congress can reasonably include in the net estate of a decedent such trusts as are here under discussion is to inquire whether a state can by statute, without violating the Fourteenth Amendment, subject to the payment of the debts of a decedent property which he had, prior to the statute, transferred to trustees with remainders to take effect at his death.

Take this case: A, in 1905 and when free from debt, transfers property to B as trustee in trust to pay the income to A for life, and, on A's death, to pay the principal to C. C has a vested remainder. The state of A's domicil passes a statute in 1918 making property so held in trust available for the payment of A's debts. There can be no doubt that this supposed statute of 1918 violates the Fourteenth Amendment for it takes property belonging to C, which C owns at A's death as completely as if purchased at that moment from a stranger, to pay A's debts. It cannot be due process of law to take the property of one in

order to pay another's debts. *Hartman* v. *Greenhow*, 102 U. S. 672, 684, and Holmes J. in *Chanler* v. *Kelsey*, 205 U. S. 466, 482.

Naturally there is no direct authority on the point just discussed; but the clear weight of decision is that in the case just put a state cannot, even by a *succession* duty, tax the falling in of C's vested remainder. See *Matter of Pell*, 171 N. Y. 48 and the other decisions referred to by Hand J. in *Frew* v. *Bowers*, 12 F (2d) 625, 629. Whether if Congress had passed a *succession* tax law, i.e. a law taxing C on the falling in of his remainder, the Supreme Court of the United States would have followed those state decisions may be arguable. In *Wright* v. *Blakeslee*, 101 U. S. 174 a tax on contingent remainders was sustained.

But Congress in the Estate Tax Law, did not pass a *succession* tax payable (except secondarily) out of the trust property when the vested remainder fell in. It passed a law imposing a tax (primarily) upon the *transfer* by the decedent of his property, a tax payable, just as a debt is payable, by his personal representative out of his estate. For Congress to include in that estate property previously put in trust with vested remainders falling in at the decedent's death and in that way fix the amount and rate of tax payable is approximately the same scheme as if a state should undertake to subject to the payment of a man's debts property he had already put in trust for others. In these respects there cannot be a difference between the Fifth and Fourteenth Amendments. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410.

THE EFFECT OF THE ACT IF CONSTRUED TO INCLUDE THE TRUSTS UNDER DISCUSSION

It was said in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, that the tax precedes what legatees receive and that inequalities, accordingly, among legatees do not affect the taxing power. But the opinion in that case was concerned with the prospective operation of the Act of 1916 and not with the retroactive features of the Act of 1918.

When, however, the question is whether the retroactive features of the 1918 act are reasonably and naturally adapted to the successful imposition of an estate tax on the net estates of persons dying after its passage, then the effect of those retroactive features is important for the purpose of testing what the act accomplishes.

Suppose in 1905, A possessed of capital and considerable earning power has a mother, wife and children all dependent on him for support. He wishes to care for his mother and fears that his wife, if he dies or goes mad, may not. Accordingly he transfers property to trustees, in trust to pay the income therefrom to

himself as long as he lives and while he is mentally competent, then to his mother for her life, with remainders over. When he creates the trust, he retains sufficient property to take care of his wife and children. Congress enacts the Estates Tax of 1918. What relation has his creation of such a trust to such a tax?

(a) If he dies before the passage of the 1918 Act, there is no Estate Tax.

(b) If he dies subsequent to its enactment, his executor or administrator, according to the government's contention, pays a tax not only on what he leaves but on what he has put in trust for his mother.

(c) If he suffers reverses and leaves nothing, his trustees for his mother pay an Estate Tax on the value of the trust.

(d) Under either (b) or (c) the Estate Tax is based in part or in whole, not on the value of what he transferred in trust in 1905, but on what the value of that trust is when he dies, a value which may be and probably is affected by innumerable human and natural causes.

Congress has said, or so it is assumed for this argument, that the trust he created shall be deemed part of his estate if he survives the act; in other words, that this trust property is a part of what he *transfers* when he dies. If he gives his property to his mother outright, there will be no tax; but if he gives it in trust for his mother for his life, with remainder to her on his death, there will be a tax. If he dies before the passage of the Act there will be no tax. If his executor or administrator has assets for administration, his widow and children in fact pay a tax on his mother's property and, if there are no such assets, his mother and the remainderman in fact pay it. As a matter of fact, he *transfers* when he dies no part of the trust. The tax is in reality not laid on any transfer. It is laid on the form of the trust's limitations, on his survival beyond February 24, 1919, on the success or failure of the administration of his trustees and finally is paid by one or the other objects of his bounty depending on whether he has made a success or failure of his own affairs. What have all these matters reasonably to do with the transfer of the net estate of one who dies after the passage of the Estate Tax Act? Congress is dealing with the disposition of the property of a man who dies in the future; and yet the Estate Tax is determined, not on his situation when he dies, but on a series of events occurring during his life over many of which he has no control and the consequences of which he can, until the law is passed, in no way foresee. Those events are not reasonably related to the transfer of property on his death. If two men create identical trusts of similar property in 1905, with limitations taking effect on their respective deaths, there may be a tax claimed in 1919 from the estate of one who dies in that

year and not from the estate of the other who dies previously or different amounts claimed from their respective estates or from others depending in large measure on no act done by either since the trusts were created. See the discussion in *Knowlton* v. *Moore*, 178 U. S. 41 at pp. 76, 77 and also *Hartman* v. *Greenhow*, 102 U. S. 672, 684.

CAN CONGRESS IMPOSE A WHOLLY RETROACTIVE DUTY, IMPOST OR EXCISE

Can, for example, Congress impose an excise on sales made years previously? If it can, it can practically put out of business any merchant; for the rates of taxation are within the control of Congress and the unsuspecting merchant has laid by no stores for any such rainy day.

It is true that in *Billings* v. *United States*, 232 U. S. 261 at p. 282, the Court says:

> "Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107 and authorities there cited."

It is believed that this is the sole decision giving any support to the retroactive features of the Estate Tax; and it is to be borne in mind that the act there in question, enacted August 5, 1909, imposed a tax payable September 1, 1909, on the use of a foreign built yacht. In the *Billings* case, as in the subsequent cases of *United States* v. *Billings*, 232 U. S. 289 and *United States* v. *Bennett*, 232 U. S. 299, there had been a use of such a yacht between August 5 and September 1, 1909, and moreover the tax was imposed on a use during a year which had not expired. This was a fair way of measuring the tax on the present privilege. Under these circumstances, the guarded statement of the court in the *Billings* case that a tax, "in some respects" retroactive is not unconstitutional is not much authority for the imposition of excises on transactions completed many years before.

The other decisions relied on to sustain retroactive excises are not in point:

Flint v. *Stone-Tracy Co.*, 220 U. S. 107 concerned the corporation income tax of 1909, a tax on the income of a year which had in part expired when the law was passed. The tax was construed, pp. 151, 152, as a tax on the privilege of doing business in that and subsequent years and so lacking the "element of

absolute and unavoidable demand" which, of course, would be the result of a wholly retroactive excise. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, if it can still be considered an authority after income taxes have been held to be direct, is, on its facts, like *Flint* v. *Stone-Tracy Co.*, although the language of the court, by way of *dictum*, goes so far as to take the income of the preceding year as the measure of a tax.

Nor can *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, be considered an authority for the validity of a retroactive excise. That case involved the income tax, a kind of tax previously held to have been direct and so to be apportioned according to the census. The Sixteenth Amendment did away with apportionment but did not make the income tax an excise. Accordingly the *Brushaber* case merely stands for the principle that there may be partial retroactive application in a direct tax.

Wright v. *Blakeslee*, 101 U. S. 174 was a tax on the falling in of a contingent remainder after the passage of the taxing act; — a statute of the Civil War which imposed *succession* and not *transfer* taxes.

The case of *Cahen* v. *Brewster*, 203 U. S. 543, was concerned with state *succession* taxes on legatees whose rights were still inchoate because the estate of their testator was still in process of administration.

Apart from authority, what is the pecuniary burden laid on past transactions? It is really a penalty rather than a tax. The ordinary man is shocked at paying in the future for what, when he did it, was free as air. As the power to tax is the power to destroy, the opportunities, if a retroactive excise is legal, for legal and *unavoidable* confiscation are innumerable; and, moreover, the same transaction may be taxed year after year, again and again, without limit in time. *Patton* v. *Brady*, 184 U. S. 608, 619.

DIRECT TAXES

Such being the possible results of retroactive burdens enforced with geographical uniformity throughout the country, we have to consider next whether such burdens are not really direct taxes instead of duties, imposts or excises. As said in *Eisner* v. *Macomber*, 252 U. S. 189, 206, the limitation with respect to direct taxes still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts. Even since *Pollock* v. *Farmers etc. Co.*, 158 U. S. 601, the distinction between the nature of direct and excise taxes is not clear. In the *Pollock* case, the decision turned on the nature of the tax. In *New York Trust Co.* v. *Eisner*, 256 U. S. 345, the court chiefly relied on practical and historical considerations. As pointed out already it is not necessary, practically, for the

has decided that where, by a transfer made before the passage of the act, one who dies in 1920 has created a trust, with estates limited on his death, and has, by the terms of the instrument, lost all control and ownership of the trust property, no part of that trust can be included in the property subject to the Estates Tax. In other words, the Court held that the estates limited on the transferor's life took effect in possession and enjoyment not when he died but when he created the trust. Accordingly there was no "transfer" of any kind on his death. Judge Learned Hand disagreed with the other members of the court on this point of construction. It is our contention that the opinion of the majority can be sustained. The opinion of the Court of Claims appears to be the same. *Arnold* v. *United States* and *Miller* v. *United States*, decided June 14, 1926.

To interpret correctly the statute here in question, it is essential to bear in mind the distinction between an estate tax such as that which the statute imposes and an inheritance or succession tax such as is imposed by the laws of most states.

The Federal Estate Tax law imposes an excise on the privilege of transmitting property by will or intestacy.

> *N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345.
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

The tax is on the privilege of transmitting and not upon the privilege of receiving. It is measured with reference to the amount of the estate over which the privilege is exercised, and without any reference whatever to the amount received by a beneficiary.

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49."
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47, per Taft, C. J. at 50.

An estate tax, as distinguished from a succession tax, is determined once for all as of the date of the testator's death. *Edwards* v. *Slocum*, 264 U. S. 61. It does not matter whether or not future interests are created by his will. The measure of the tax is the value of the estate at the time of the decedent's death as defined in the statute, whether he dies intestate, or by will provides for a trust with life estates and vested or contingent

remainders, the value of which can be determined only in the distant future.

On the other hand, the excise imposed by a succession or inheritance tax statute, of which the Massachusetts statute is a typical example, is not imposed on the privilege of transmitting property by will or intestacy, but upon the privilege of beneficiaries to succeed to property. Massachusetts General Laws, chap. 65, sec. 1. See *Attorney General* v. *Stone*, 209 Mass. 186, 190; *Burnham* v. *Treasurer and Receiver General*, 212 Mass. 165, 167.

The nature of inheritance tax statutes (again taking the Massachusetts statute as a fair example) is further emphasized by the fact that the tax is graduated not with reference to the value of the estate disposed of by the decedent but with reference to the value of the interest received by the beneficiary. Massachusetts General Laws, chap. 65, sec. 1.

Interpreting the Revenue Act of 1918 with reference to the commodity upon which it imposes an excise it is clear that the words "intended to take effect in possession or enjoyment" have to do only with the taking effect of the original transfer as a whole. See *Fidelity etc. Company* v. *Lucas*, 7 F. (2d) 146. From that point of view the trust takes effect in possession and enjoyment when the settlor divests himself of possession and enjoyment. Where a decedent divests himself of both possession and enjoyment prior to the passage of the Estate Tax law, no commodity remains in him upon which the excise can be imposed. It is immaterial when or in what order pursuant to the terms of the trust the usufruct is enjoyed by its beneficiaries, since the usufruct presents not the commodity of transmission but the commodity of succession upon which no excise is imposed by the Revenue Act of 1918.

The words "created a trust . . . intended to take effect in possession or enjoyment at or after his death" are those commonly used in succession tax statutes, where they aptly describe the subject matter of the tax, *viz.*, the succession. They are undoubtedly intended, in such statutes, to apply to the ordinary trust with life and remainder interests. Congress, perhaps, adopted these words, with reference to past transactions, without realizing their complete inappropriateness in a statute which taxes not successions but transfers. Either it must be supposed that Congress used these words inadvertently, or that they were intended to apply to instances, conceivable, though rare, of trusts when the creation of the trust itself, as distinguished from the succession to the remainder interests, was intended to take effect in possession or enjoyment after the death of the creator of the trust. In either event, the use of these words cannot justify an interpretation inconsistent with

the basic language of the Estate Tax of 1918, *viz.*: a tax on the transfer of the net estate of one who dies after its passage.

Respectfully submitted,

ARTHUR D. HILL,
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APPENDIX

CONSTITUTION OF THE UNITED STATES

Article I

Sec. 2 . . . Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers. . . .

Sec. 8 The congress shall have power — to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

Sec. 9 . . . No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. . . .

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

Act of February 24, 1919; 40 Stat. 1096, entitled: "An act to provide revenue, and for other purposes."

Sec. 401 That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States.

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000;

6 per centum of the amount by which the net estate exceeds $450,000 and does not exceed $750,000;

8 per centum of the amount by which the net estate exceeds $750,000 and does not exceed $1,000,000;

10 per centum of the amount by which the net estate exceeds $1,000,000 and does not exceed $1,500,000;

12 per centum of the amount by which the net estate exceeds $1,500,000 and does not exceed $2,000,000;

14 per centum of the amount by which the net estate exceeds $2,000,000 and does not exceed $3,000,000;

16 per centum of the amount by which the net estate exceeds $3,000,000 and does not exceed $4,000,000;

18 per centum of the amount by which the net estate exceeds $4,000,000 and does not exceed $5,000,000;

20 per centum of the amount by which the net estate exceeds $5,000,000 and does not exceed $8,000,000;

22 per centum of the amount by which the net estate exceeds $8,000,000 and does not exceed $10,000,000; and

25 per centum of the amount by which the net estate exceeds $10,000,000.

Sec. 402 That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Sec. 407 That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally

determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409 That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Massachusetts General Laws, Chap. 65

Section 1. [In part] All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except . . . , shall be subject to a tax at the percentage rates fixed by the following table:

[Then follow rates depending on the relationship of the recipient to the deceased and the amount of property received.]

In the Supreme Court of the United States

OCTOBER TERM, 1926.

No. 38.

MALCOLM E. NICHOLS, Collector of Internal Revenue of the United States for the District of Massachusetts,
Plaintiff in Error,

vs.

HARRIS J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of John Coolidge,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF AMICI CURIAE.

Austin F. Knowlton,
Attorney-at-Law,
Amici Curiae.

[illegible] Company Inc., [illegible] Street, [illegible], Mass.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

No. 88.

MALCOLM E. NICHOLS, Collector of Internal Revenue of the United States for the District of Massachusetts,
Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of Julia Coolidge,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF AMICI CURIAE.

This brief is presented for the purpose of directing attention to the fact that the case of Shukert vs. Allen, No. 193, October Term, 1926, will soon be argued and submitted to this Court.

The questions involved in the instant case are similar to some of the questions that are presented by the record in Shukert vs. Allen. Briefly, the facts in that case are as follows:

STATEMENT.

On May 5, 1921 Gustave E. Shukert transferred to United States Trust Company of Omaha, Nebraska, by trust deed, absolute in form, certain personal property, consisting of liberty bonds and notes secured by real estate mortgages of the actual value of $190,157.55. The conveyance was in trust for the use and benefit of three children of the creator. It was an unconditional conveyance and took immediate effect, the property described in the trust was delivered to the trustee and is now and ever since the conveyance was made has been held by the trust company. The conveyance was voluntary and without consideration. By this trust conveyance there was a transfer of property from the founder to the trustee for the benefit of the beneficiaries named therein. The income of the trust fund so created was to accumulate in the hands of the trustee until the termination of the trust. The trust was to continue for a period of thirty years, that is, until February 1, 1951, unless the death of the last survivor of the beneficiaries named occurred more than twenty-one years prior to February 1, 1951, in which case, said trust was to terminate twenty-one years after the death of the last survivor. The sole beneficiaries of the trust were the founder's children. At the termination of the trust these children were to receive the principal and accumulated income, share and share alike. There was no power reserved to the founder or any other person to modify, change or alter any of the terms or conditions of the trust. There were no reservations of power or control over the property described in the trust. The trust was irrevocable. One provision in it provided that in the event of the death of a beneficiary, without issue, the other beneficiaries became the owners of the interest of the deceased beneficiary. By this provision,

the founder deprived himself of the right to inherit the property of the beneficiaries in the event of their death.

At the time this trust was created, the founder was just past 56 years of age. On September 29, 1921, four months and twenty-four days after creating the said trust, the founder died, testate, at Omaha, Nebraska. By his will, made two days before his death, he disposed of all the estate of which he died seized and appointed Elizabeth F. Shukert and Isabel C. Shukert as executrices of his estate.

After his death, the executrices filed with the Collector of Internal Revenue, in the manner required by the Revenue Act of 1918, the return of said estate for federal estate taxes. They included in this report all of the property of the estate of Gustave E. Shukert, of which he died seized. They did not include in this return the value of the property transferred in the deed of trust of May 5, 1921, for the reason that they believed and claimed that said transfer was not "*made in contemplation of or intended to take effect in possession or enjoyment at or after his death,*" within the meaning of the provisions of sub-paragraph (c) of Section 402 of the Revenue Act of 1918.

Afterward, on the final account and review of the return so filed by the executrices, the Commissioner of Internal Revenue included in "the gross value of the estate of decedent" the property transferred by the trust agreement aforesaid and assessed additional taxes against said estate on account thereof in the sum of $13,685.47. This additional tax was paid, under protest, claim made for refund, which claim was rejected by the Revenue Department. Still later, the executrices began the action

of Shukert vs. Allen to recover the additional estate tax so paid.

On the trial in the District Court of Nebraska, the court held that the tax was valid and instructed the jury to return a verdict in favor of the defendant. The opinion of the trial court was reported in 300 Fed. 754. From this judgment an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. There the judgment of the trial court was affirmed. Shukert vs. Allen, 6 Fed. (2nd.) 551. From that order and judgment an application for writ of certiorari was made, which writ was allowed by this Court on the 19th of October, 1925. 70 L. ed. 26.

The Commissioner of Internal Revenue levied the taxes in dispute on the theory that the trust agreement "was made in contemplation of death." Both sides proceeded with the trial of the case on that theory. After all the evidence had been introduced, the trial court suggested that under the provisions of sub-paragraph (c) of Sec. 402 of the Revenue Act of 1918 there were two kinds of trusts subject to taxation. First, trust made in contemplation of death. Second, trusts that did not take effect until at or after the death of the creator.

Following this, the trial court held that under the terms of this trust agreement, the beneficiaries were to come into the enjoyment and possession of the property after the death of the founder and, therefore, this trust by its terms took effect after the death of the creator.

Stating it in another way: the trial court held that the beneficiaries did not come into the possession or enjoyment of the trust property until the date on which the trust ended.

Among the questions presented for review is: When does a beneficiary "come into the possession and enjoyment" of trust property that is delivered to a trustee under the terms of an executed trust that contains no conditions, restrictions or reservations.

ARGUMENT.

We will not cite authorities or advance arguments other than to state:

1. That an estate tax, under the provisions of Section 402, is a tax in the nature of a death duty and is levied on the right or privilege of transferring or transmitting the property from the dead to the living. When the transfer is made in contemplation of death or is made in a way that the death of the donor passes the title to the property to the beneficiaries, estate taxes can be levied.

2. Where a donor conveys property absolutely, by a trust agreement, and surrenders possession of the property to the trustee, it is an executed trust and takes effect *in presenti*. The trustee holds possession for the benefit of the beneficiaries, who begin to enjoy the trust on the date that it is created and possession of the property surrendered. The title to the property passes from the donor to the trustee and beneficiaries and the interests of the parties are fixed and become vested on the date of the execution of the trust and not at the end of the trust period.

3. The trust agreement executed by Mr. Shukert deprived him absolutely and unconditionally of the posses-

sion and enjoyment of the property conveyed by him. The possession passed from him to the trustee for the benefit of the beneficiaries and the beneficiaries immediately received a present interest and began to enjoy the benefits of the trust agreement.

4. Under the terms of the trust agreement, the death of Mr. Shukert in no way affected or changed the rights or the interests of either the trustee or the beneficiaries.

If the rules adopted in Shukert vs. Allen by the trial court and approved by the Circuit Court of Appeals is the law, then all executed trusts, whenever made, are subject to estate taxes if the end of the trust period occurs after the death of the creator.

The importance of the questions presented is such that we deem it our duty to briefly state the facts and to ask that the questions involved in Shukert vs. Allen be left undetermined until we can render such assistance as we may be able to give in our brief and by oral argument.

Respectfully submitted,

Arthur F. Mullen,

Antionette Funk,

Amici Curiae.

November 30, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1926.

Malcolm E. Nichols, Collector of Internal Revenue of the United States for the District of Massachusetts, Plaintiff in Error, *vs.* Harold J. Coolidge and Augustus P. Loring, Executors of the Will of Julia Coolidge.	In Error to the District Court of the United States for the District of Massachusetts.

[May 31, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

Defendants in error sued to recover additional federal taxes exacted of the estate in their keeping. The cause was heard upon an agreed statement; judgment went for them on a directed verdict; and this writ of error, allowed April 3, 1925, brings the matter here. In a comprehensive charge the trial court interpreted the law, but gave no further opinion. 4 Fed. (2d) 112.

Mrs. Julia Coolidge, of Massachusetts, survived her husband and died January 6, 1921. As required by the Revenue Act approved February 24, 1919, c. 18, 40 Stat. 1057, 1096, the executors returned a schedule to the Collector. He estimated the gross estate at $180,184.73 and allowed $77,747.74 deductions. They paid the amount assessed upon the balance. Their return did not include certain property transferred by the decedent through duly executed deeds and without valuable consideration, some to trustees and some directly to her children. The Commissioner of Internal Revenue held that under Section 402 (c) the value of all this property at her death must be included in the gross estate. He raised the assessment accordingly and demanded the additional tax—$34,662.65—here challenged.

July 29, 1907, Mrs. Coolidge and her husband owned certain real estate in Boston, also valuable personal property, which they

transferred without consideration to trustees, who agreed to hold it and pay the income to the settlors, then to the survivor, and after his death to distribute the corpus among the settlors' five children or their representatives. The deed directed that the interest of any child predeceasing the survivor should pass as provided by the statute of distribution "in effect at the time of the death of such survivor." The trustees were authorized to sell the property, to make and change investments, etc. April 6, 1917, the settlors assigned to the children their entire interest in the property, especially any right to the income therefrom. At the death of Mrs. Coolidge the trustees held property worth $432,155.35, but through sales and changes much of what they originally received had passed from their possession.

May 18, 1917, by deeds purporting to convey the fee Mrs. Coolidge—her husband joining—gave their five children two parcels of land long used by her for residences. Contemporaneously the grantees leased these parcels to the conveyors for one year at nominal rental, with provision for annual renewals until notice to the contrary. All parties understood that renewals would be made if either lessee wished to occupy the premises. When Mrs. Coolidge died the value of this property was $274,300.

Plaintiff in error now maintains the above-described transfers by Mrs. Coolidge were intended to take effect in possession or enjoyment at or after death, within the ambit of Section 402 (c), Act February 24, 1919, and that the value at her death of the property held by the conveyees constituted part of her gross estate.

The court below held the transfer of the residences (1917) was absolute; the right to possess or enjoy them did not depend upon death; and their value constituted no part of the gross estate. Also, that under the statute the value of the property conveyed to trustees in 1907 or resulting therefrom must be included in the gross estate, but, thus construed, the Act went beyond the power of Congress.

Relevant portions of "Title IV—Estate Tax," Act February 24, 1919, are printed below.* It undertakes to lay a charge equal to

*Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after

the sum of specified percentages—from one to twenty-five—"of the value of the net estate . . . upon the transfer of the net estate of every decedent" dying thereafter. And it directs that the net estate shall be ascertained by deducting from the gross certain items and an exemption of $50,000. Also, "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated"—

(a) To the extent of his interest therein subject to the payment of charges against the estate, expenses of administra-

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the passage of this Act, whether a resident or non-resident of the United States.

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,00;

6 per centum of the amount by which the net estate exceeds $450,000 and does not exceed $750,000; . . .

25 per centum of the amount by which the net estate exceeds $10,000,000. . . .

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other

tion, and subject to distribution. (b) The dower or courtesy, etc., interest of the surviving spouse. (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. (d) Any interest

institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate [specified items and an exemption of $50,000] . . .

Sec. 408. . . . If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the

held jointly with another and payable to the survivor.

(e) Property passing under a general power of appointment.

(f) The excess over $40,000 of insurance taken out by the decedent upon his own life.

Edwards v. *Slocum*, 264 U. S. 61, 62, says of this tax: "What was being imposed here [Act February 24, 1919] was an excise upon the transfer of an estate upon death of the owner." *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50. "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.'"

Concerning transfer of the residences in 1917, the trial court charged—

> I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and

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gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

I will first consider the claim of the parties respecting those transfers.

The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

The leases, executed the same day, were for one year or any renewal thereof, but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the terms of the lease. If it could be said that the grantee did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease, and had all rights incident to ownership. There was here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts.

I have reached the conclusion, therefore, that respecting the property conveyed by the deed the facts of this case do not bring the property within the reach of the statute, and that the Commissioner of Internal Revenue was without authority to include the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Coolidge within the meaning of the Revenue Act of 1918.

We agree with this conclusion and accept as adequate the reasons advanced to support it.

Counsel for the United States argue that the challenged subsection only undertakes to tax the transfer from the dead and merely uses the gross estate to measure the charge. Taken together,

Sections 402, 408 and 409 disclose definite purpose to do much more than tax this transfer.

Section 402 directs that the gross estate shall be ascertained by including (among other things) the value at his death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth." The language of this section inhibits the conclusion that only subsequent transfers are to be included. Under *Lewellyn* v. *Frick*, 268 U. S. 238, 251, only such transfers come within Section 402 (f). *Shwab* v. *Doyle*, 258 U. S. 529, 536, confined Section 202 (b), Act September 8, 1916, c. 463, 39 Stat. 756, 777—prototypes of Section 402 (c), Act 1919—to subsequent transfers. The emphatic words, "whether such transfer or trust is made or created before or after the passage of this Act," added by the latter Act, evidently were intended to exclude a like construction.

Section 408 authorizes an executor to recover from one who receives life insurance "such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate." Section 409 imposes a lien to secure the tax upon the gross estate; and provides: "If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax."

For the United States it is said that the imposition under consideration is an exercise of the federal taxing power and is imposed upon a transmission of property by death. Also, that

what Congress intended was to provide a measure for the tax which would operate equally upon all those who made testamentary dispositions of their property, whether this was by will or intestacy or only testamentary in effect; the immediate purpose was not to prevent evasions, for the statute applies to transactions completed when there was none to be evaded. And the conclusion is that the measure adopted is reasonable, since the specified transactions are testamentary in effect.

But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power. The language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death. See *Lewellyn* v. *Frick*, *supra*. *Frick* v. *Pennsylvania*, 268 U. S. 473, 494, rejected a somewhat similar claim, and said—"Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail."

The exaction is not a succession tax like the one sustained by *Scholey* v. *Rew*, 23 Wall. 331. *Keeney* v. *New York*, 222 U. S. 525. The right to become beneficially entitled is not the occasion for it. There is no claim that the transfers were made in contemplation of death or with purpose to evade taxation. The provision applicable in such circumstances is not relied on and the extent of congressional power to prevent evasion or defeat of duly-imposed exactions need not be discussed.

Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is

beyond them. Taxes are very real things and statutes imposing them are estimated by practical results.

As the executors paid the contested charge out of property which actually passed by death, only their rights are here involved. If the fund held by them had been insufficient and payment had been exacted from others, somewhat different questions might require consideration. *Lewellyn* v. *Frick, supra.*

The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers, Collector*, 12 Fed. (2d) 625.

This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77. And we must conclude that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the

value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider.

The judgment of the court below is

Affirmed.

Mr. Justice HOLMES, Mr. Justice BRANDEIS, Mr. Justice SANFORD and Mr. Justice STONE concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.